STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

JOSEPH G. NICKOLA, Personal Representative
of the Estates of GEORGE NICKOLA, deceased,
And THELMA NICKOLA, deceased,

Plaintiff-Appellant

Docket No. 152535
COA No. 322565
Genesee CC: 05-081192-NI

vs.

MIC GENERAL INSURANCE CORPORATION,

Defendant-Appellee.

DEFENDANT-APPELLEE MIC GENERAL INSURANCE CORPORATION'S AMENDED BRIEF FOR THE ORDERED MINI-ORAL ARGUMENT ON THE APPLICATION

ORAL ARGUMENT REQUESTED

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II. **Whether the Court of Appeals Decision in this Case is Consistent with *Yaldo v North Pointe Ins Co*, 457 Mich 341 (1998), and *Griswold Properties LLC v Lexington Ins Co*, 276 Mich App 551 (2007).**

INTRODUCTION

This case involves a claim for underinsured motorist coverage following an auto accident occurring on April 13, 2004. George and Thelma Nickola[1] settled a claim against the other driver in the accident, Roy Smith, for $40,000, $20,000 each for George and Thelma. The Nickolas sought underinsured motorist coverage following their settlement with Smith from defendant-appellee MIC General Insurance Company. The Nickolas subsequently filed suit seeking arbitration regarding the underinsured motorist coverage. MIC agreed to arbitration shortly after filing its answer in the suit, but the Nickolas refused to stipulate to dismissal of the suit to go to arbitration. The Nickolas dragged the case through the court for nearly a year before the trial court was finally able to order the case to arbitration. The Nickolas then waited over two months to select their arbitrator. MIC responded with its own arbitrator within three days. These arbitrators were not able to select a neutral. Despite this, the Nickolas did nothing further with the case, simply abandoning its prosecution. Thelma then died of lung cancer on January 24, 2008, nearly two years after the case was ordered into arbitration and nearly four years after the accident. George died on April 14, 2012, more than six years after the case was ordered into arbitration and more than eight years after the car accident. The Nickolas thus had not prosecuted their case for the better part of a decade, which indicated that they agreed with MIC's denial of coverage based on the fact that they were not entitled to further recovery above the $40,000 that they had already received in noneconomic damages in settling with Smith. After the Nickolas' deaths, appellant picked up the Nickolas' abandoned case and filed a motion to appoint a neutral arbitrator, six years and five months after the matter was ordered into arbitration. Following arbitration, Joseph

[1] George and Thelma Nickola will be referred to collectively as the Nickolas and separately by their first names. Plaintiff-appellant Joseph Nickola, who technically is in the role of representing two separate estates, will be referred to as either appellant or Joseph Nickola.

Nickola sought to profit from the years of delay by seeking attorney fees and interest to cover the entire time that the Nickolas were doing absolutely nothing in the case. The trial court properly rejected this attempt to profit from the apparent intentional lack of progress and abuse of the arbitration system and denied the motion for sanctions and penalty interest. The Court of Appeals affirmed the trial court's decision regarding MCR 2.114 sanctions and the requested penalty interest pursuant to the Uniform Trade Practices Act (UTPA). Regarding the UTPA, the Court of Appeals reasoned that the Nickolas, as underinsured motorist claimants, were, in actuality, third-party tort claimants because they were required to prove a tort case in order to establish entitlement to benefits under the underinsured motorist policy. Given this fact, the Nickolas and appellant were not entitled to automatic UTPA penalty interest, but would have only been entitled to such penalty interest if their claims were not reasonably in dispute. The Court of Appeals affirmed the trial court's decision that the claims were reasonably in dispute in this matter. Joseph Nickola filed an application to this Court on the sanction and UTPA issues. This Court ordered a mini-oral argument on the application on the UTPA issue, namely whether a claimant under an uninsured motorist policy can be considered a "third party tort claimant" as referenced in MCL 500.2006(4) and whether the Court of Appeals decision is consistent with *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998) and *Griswold Prop LLC v Lexington Ins Co*, 276 Mich App 551; 741 NW2d 549 (2007), lv den 480 Mich 1044 (2008). The simple answer to both of these questions is yes, the Court of Appeals in this case properly followed the plain language and intent of the statute and the precedent from this Court in *Yaldo* to find that underinsured motorist claimants are third-party tort claimants for purposes of MCL 500.2006(4) as underinsured motorists claimants are required to prove multiple things, including the right to recover in tort, before being able to recover under the insurance policy. Given that the Court of Appeals carefully followed *Yaldo*,

reversing the Court of Appeals decision in this case would require this court to reverse its decision in *Yaldo* that a party is entitled to automatic penalty interest regardless of a reasonable dispute only in cases where their claim was based "***solely***" in contract. Abandoning this precedent would be contrary to the intent of the Legislature and would be inappropriate under the *Robinson v City of Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000) standard. Leave to appeal should be denied in this matter, and the Court of Appeals decision should be allowed to stand.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. The Nickolas' Underlying 2004 Accident and Background Information

This case stems from an auto accident occurring on April 13, 2004. The Nickolas alleged injuries caused by the other driver, Smith. (Complaint, Appendix 1, ¶¶ 5, 9) The Nickolas had a Personal Automobile Vehicle Insurance policy with MIC. The MIC policy provided both uninsured and underinsured motorist coverage. (Policy Declarations, Appendix 2)

At the time of the accident, the Nickolas were both elderly. George was born June 30, 1928, and Thelma was born January 4, 1928. It is undisputed that George admitted to prior knee and wrist problems along with diabetes, hypertension and memory problems. Thelma admitted to prior emphysema, diabetes, high blood pressure and a history of back surgery.

Smith was insured as required by Michigan law. And the Nickolas negotiated with Smith and Smith's insurer for a tort settlement following the accident. The Nickolas asked for, and were granted, permission by MIC to settle with Smith ***for his full policy limits*** for liability coverage under his Progressive Insurance insurance policy. MIC sent the letter granting permission to settle with Smith for the full policy limits on October 14, 2004. (Settlement Permission Letter, Appendix 3) The Nickolas settled with Smith for his full policy limit for tort coverage on November 21, 2004. They each received $20,000 for their tort settlements. (Releases, Appendix 4)

II. The MIC Underinsured Motorist Coverage

The MIC underinsured motorist coverage provides that MIC will pay "compensatory damages which an 'insured' is ***legally entitled to recover from the owner or operator*** of an 'underinsured motor vehicle'. . . ." (Underinsured Motorist Coverage Policy Section, Appendix 5, p 1, emphasis added) Thus, the right to recover benefits under the policy is predicated on the success of a third-party tort claim. (Appendix 5, p 1) The right to recover underinsured motorist benefits is also dependent on the insured obtaining a judgment or settling with the underinsured motorist and exhausting all coverage:

> We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements. [Appendix 5, p 1.]

Pursuant to this provision, the Nickolas were not even eligible to request underinsured motorist benefits until after the approved settlement with Smith on November 21, 2004. (Appendix 4; Appendix 5, p 1) The Nickolas, in fact, waited over two months before actually making any claim for underinsured motorist benefits on February 8, 2005. (Underinsured Demand Letter, Appendix 6) MIC responded nearly immediately, denying the claim for underinsured motorist coverage on February 17, 2005, noting the Nickolas' preexisting issues and their return to their normal lives following the accident, which precluded any right to recovery under the terms of the policy. (Underinsured Denial Letter, Appendix 7; Appendix 5)

The MIC underinsured motorist coverage provided for the possibility of arbitration of disputes regarding the entitlement and amount of underinsured motorist coverage:

> **ARBITRATION**
> A. If we and an "insured" do not agree:
>
> 1. Whether that person is legally entitled to recover damages under this endorsement; or
> 2. As to the amount of damages;

> Either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction.
>
> B. Each party will:
>
> 1. Pay the expenses it incurs; and
>
> 2. Bear the expenses of the third arbitrator equally.
>
> C. Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding as to:
>
> 1. Whether the "insured" is legally entitled to recover damages; and
>
> 2. The amount of damages. ***This applies only if the amount does not exceed the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged. If the amount exceeds that limit, either party may demand the right to a trial.*** This demand must be made within 60 days of the arbitrators' decision. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding. [Appendix 5, p 2, emphasis added.]

The Nickolas decided to pursue arbitration, filing a demand for arbitration on February 22, 2005. (Arbitration Demand, Appendix 8) On March 1, 2005, MIC denied the request for arbitration. It mistakenly did so on the basis of standard language that typically appears in MIC uninsured and underinsured policy provisions requiring that both the insured and MIC agree to arbitration. (Arbitration Denial, Appendix 9)

III. The Trial Court Proceedings and Abandonment by the Nickolas

After MIC denied the arbitration request, the Nickolas then waited over a month before filing the complaint underlying this case, demanding arbitration on April 8, 2005. (Appendix 1) After MIC answered the complaint, MIC was able to locate a certified copy of the policy. At that time, MIC noted that the underinsured motorist coverage section used non-traditional language to allow either party to demand arbitration. MIC's attorney then contacted the Nickolas' attorney to stipulate to the dismissal of the action so that the case could be arbitrated. (Brickley Affidavit,

Appendix 10)

The Nickolas refused to dismiss the action. They instead demanded that the case proceed until MIC paid the Nickolas some form of claimed attorney fees, albeit without providing a basis for such fees. (Appendix 10) Because the Nickolas would not agree to dismiss the case, which they brought to demand arbitration, and proceed to arbitration as agreed to by MIC, MIC was stuck in the Nickolas' now completely unnecessary litigation.

On February 1, 2006, nearly 10 months into the litigation, the Nickolas filed a Motion to "Correct or Strike Pleadings, Impose Sanctions, Assess Costs and/or Fees and Remove From ADR Docket [sic]." The trial court heard oral argument on the motion on February 14, 2006. On March 6, 2006, the Court issued its order splitting the case in two, sending the majority of the case to arbitration, but keeping the sanction issue to be decided by the trial court at that time. The order required the Nickolas to supply their "list of costs and expenses, as well as attorney fees." (3-6-06 Order, Appendix 11) ***The Nickolas never complied with the March 6, 2006 Order. And they never supplied the required list of fees, costs, and expenses. Instead, they simply abandoned the issue.***

The Nickolas waited over two months to name an arbitrator on May 9, 2006. MIC responded three days later, naming its chosen arbitrator and asking that the two arbitrators choose a neutral arbitrator pursuant to the terms of the underinsured motorist arbitration provision. (5-12-06 Letter Regarding Chosen Arbitrators, Appendix 12)

The chosen arbitrators could not decide on a neutral arbitrator within 30 days as required by the policy. Therefore, the policy provided that a motion be filed to seek court appointment of the neutral: "The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction." (Appendix 5, p 2) As

the plaintiffs in the matter, as the parties seeking the arbitration, and as the parties claiming that the $20,000 tort recovery that each of the Nickolas had already received was insufficient to fully compensate them, it was the Nickolas' duty to file the motion to appoint the third/neutral arbitrator. But they did not do so. ***Instead, the Nickolas simply ignored and abandoned the case***. This left MIC in the position of believing that the matter was concluded. It had no reason to press the issue and seek arbitration given that, by failing to seek further arbitration, the Nickolas were apparently conceding MIC's position that the Nickolas were not entitled to further recovery beyond the $40,000 they had already received in noneconomic damages.

IV. The Nickolas Pass Away and Joseph Nickola Restarts the Abandoned Case Years Later

Thelma died of lung cancer on January 24, 2008, ***almost two years after the case was ordered to arbitration*** on March 6, 2006. (See Second Motion to Assess Costs and Fees, Appendix 13, p 15, ¶ 33) Even after Thelma's death, nothing occurred in the case or arbitration. Then, ***more than four years later***, George died on April 14, 2012. (Notice of Death, Appendix 14) But still nothing occurred in the case. Instead, the case was completely abandoned.

Despite the clear abandonment of any claimed right to benefits years before by the Nickolas, two months after George's death, Joseph Nickola substituted in as the plaintiff in the case on June 13, 2012. (Notice of Substitution, Appendix 15) Even with the substitution of Joseph Nickola as plaintiff, the case did not proceed in a timely manner. Joseph Nickola did nothing in the case for another two months before filing a motion to appoint a neutral arbitrator on August 3, 2012, ***six years and two months after this should have occurred*** when the two non-neutral arbitrators could not agree on a neutral arbitrator by June 11, 2006. (Motion for Appointment of Arbitrator, Appendix 16; Appendix 12; Appendix 5)

On August 13, 2012, the trial court appointed the neutral arbitrator within 10 days of the

filing of the motion. (Order Appointing Arbitrator, Appendix 17) Arbitration did not occur for over a year. The hearing finally occurred on October 2, 2013, with the arbitration award entering that same day. (Arbitration Award, Appendix 18)

After the entry of the arbitration award, MIC had the right to reject the amount of damages and proceed to trial regarding the damages. MIC had 60 days to make the decision on whether or not to accept the arbitration determination of damages. (Appendix 5, p 2) MIC decided not to further contest the amount of damages. At that time, the requirements for underinsured motorist coverage pursuant to the terms of the policy were satisfied for the first time, and MIC tendered full payment of the award. But this tender was rejected by Joseph Nickola. Instead, he decided to renew the motion for sanctions abandoned the better part of a decade earlier by the Nickolas. Joseph Nickola again requested again that the Court enter an order sanctioning MIC for a frivolous defense pursuant to MCR 2.114. He also requested 12% penalty interest be awarded pursuant to the UTPA. (Appendix 13) Even the filing of this motion was significantly delayed as Joseph Nickola waited for nearly two months after the arbitration before finally filing the second motion on November 25, 2013. (Appendix 13)

Oral argument of the second version of the sanction motion occurred on December 9, 2013. The trial court noted that it did not agree to hold the issue of UTPA penalty interest back from the arbitrators. (12-9-13 Transcript, Appendix 19, pp 15-16) MIC once again tendered full payment of the arbitration awards at the hearing, offering the checks to appellants. (Appendix 19, pp 23-25) Appellant did not accept the tender.

The trial court issued its order on the matter on June 26, 2014. The Court found inconsistency between the No Fault Act and the UTPA, MCL 500.2006. It also noted that the underinsured motorist claims were reasonably in dispute and that any issue regarding the wrongful

withholding of the underinsured motorist benefits should have been submitted to the arbitrators. The Court otherwise denied the motion and affirmed the arbitration. (Final Order, Appendix 20)

V. The Appeal to the Court of Appeals

Appellant filed a claim of appeal to the Court of Appeals on July 7, 2014. (Court of Appeals Docket, Appendix 21, Entry 1) After repeated delays by appellant, oral arguments were set for September 10, 2015. (Appendix 21, Entries 17-18, 20-21, 26, 32, 37) Per its duty to the court, MIC submitted subsequent relevant published authority on the issue of UTPA penalty interest that the Court of Appeals had issued subsequent to MIC's appellee brief on August 28, 2015. (Appendix 21, Entry 38) MIC cited to *Adam v Bell*, 311 Mich App 528; __NW2d__ (2015), in which the Court of Appeals detailed the differences between underinsured/uninsured motorist coverage and first party insurance coverage. That case specifically made clear that the underinsured/uninsured motorist claimants were third-party tort claimants required to prove their third party tort case in order to recover insurance benefits. This ruling directly supported the trial court's conclusion that UTPA penalty interest was not applicable to this case in which the claims were reasonably in dispute. Appellant then moved to strike the subsequent authority, despite it being on point and issued after even appellant's reply brief was filed. (Appendix 21, Entry 39) MIC responded, noting the frivolity of the motion to strike. (Appendix 21, Entry 42) The Court of Appeals denied the motion to strike on September 9, 2015. (Appendix 21, Entry 43) Oral argument proceeded as scheduled on September 10, 2015.

The Court of Appeals issued its published opinion on September 24, 2015. *Nickola v MIC Gen Ins Co*, 312 Mich App 374; __NW2d__ (2015). Although the trial court's final order affirmed the arbitration award and disposed of all of the actual issues in the case, the Court of Appeals concluded that it did not amount to a "final order" pursuant to MCR 7.202(6) because it was not

specifically labeled a "judgment." The Court of Appeals, therefore, characterized the claim of appeal as an application for leave to appeal, which it granted. *Nickola*, 312 Mich App at 377 n2. Regarding appellant's claim for sanctions pursuant to MCR 2.114, the Court of Appeals affirmed the trial court's decision not to award any sanctions. *Id.* at 381-383. Regarding UTPA penalty interest, the Court again affirmed the decision of the trial court not to award penalty interest. Following this Court's precedent in *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005) and the Court of Appeals precedent in *Adams*, the Court of Appeals noted that underinsured motorist claimants like the Nickolas were actually third-party tort claimants:

> In order for plaintiff to succeed on his UIM claim, he has to essentially allege a third-party tort claim against his own insurer—or, in this case, against the insurer of George and Thelma, of whom plaintiff is the personal representative. Defendant, the insurer, stands in the shoes of the alleged tortfeasor and plaintiff seeks benefits from defendant that arose from the alleged tortfeasor's liability. See *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 464-466; 430 NW2d 636 (1988) (explaining UIM coverage). See also *Rory v Cont'l Ins Co*, 473 Mich. 457, 465; 703 NW2d 23 (2005) (explaining that "[u]ninsured motorist insurance" which is substantially similar to UIM insurance, "permits an injured motorist to obtain coverage from his or her own insurance company to the extent that a third-party claim would be permitted against the [ ] at-fault driver."). This third-party tort claim is different in nature from a typical claim for first-party benefits, as it will "often require proof of the nature and extent of the injured person's injuries, the injured person's prognosis over time, and proof that the injuries have had an adverse effect on the injured person's ability to lead his or her normal life." *Adam v Bell*, 311 Mich App 528, 535; __NW2d__, 2015 Mich App LEXIS 1577 (Docket No. 319778, issued August 11, 2015) (citation and quotation omitted). In addition, such a third-party tort claim is designed to compensate a claimant "for past and future pain and suffering and other economic and noneconomic losses rather than compensation for immediate expenses" that are generally associated with a first-party claim. *Id.* (citation and quotation omitted). In other words, plaintiff's UIM claim is tied to a third-party tort claim for damages that, in many respects, is "fundamentally different" than a typical first-party claim. See *id.* (citation and quotation omitted). [*Nickola*, 312 Mich App at 387-388.]

The Court concluded that, because the claim for benefits was specifically tied to the underlying third-party tort claim, the reasonably in dispute language of MCL 500.2006(4) applied to the case, which meant that appellant was not automatically entitled to UTPA penalty interest.

The Court also affirmed the trial court's conclusion that the insurance claim was reasonably in dispute given the Nickolas' ages, preexisting conditions, the nature of the claimed injuries, and the amount of claimed damages. *Nickola*, 312 Mich App at 389-390.

Finally, the Court of Appeals addressed appellant's request for prejudgment interest, which was raised for the first time in the appellant brief on appeal. The Court of Appeals declined to address the issue based primarily on the fact that the trial court's final order did not specifically state that it was a judgment. *Id.* at 391-392. The Court remanded to the trial court on this issue explaining that the trial court could deny the claimed interest for the time that the Nickolas and appellant delayed matters. *Id.* at 392.

No further proceedings occurred in the trial court. Instead, appellant filed his application to this Court on October 29, 2015. (Appendix 21, Entry 50) MIC filed its brief in opposition to the application on November 24, 2015. (Appendix 21, Entry 53) This Court ordered oral argument on the application on May 25, 2016. *Nickola v MIC Gen Ins Co*, __Mich__; 878 NW2d 886 (2016). The Court limited this issues to

> (1) whether an insured making a claim for underinsured motorist benefits may be considered to be a "third party tort claimant" under MCL 500.2006(4), thereby requiring the insurer to pay twelve percent interest for failing to pay the claim on a timely basis only if the claim "is not reasonably in dispute"; and (2) whether the Court of Appeals decision in this case is consistent with *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 N.W.2d 274 (1998), and *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551; 741 N.W.2d 549 (2007). [*Nickola*, __ Mich__, slip op p 1.]

ARGUMENT

I. An Insured Making a Claim for Underinsured Motorist Benefits is a "Third Party Tort Claimant" Under MCL 500.2006(4), Thereby Requiring the Insurer to Pay Twelver Percent Interest for Failing to Pay the Claim on a Timely Basis *Only if* the Claim "is Not Reasonable in Dispute"

A. Standard of Review

"This Court reviews de novo questions of statutory interpretation. . . ." *Jesperson v Auto*

Club Ins Ass'n, 499 Mich 29, 34; 878 NW2d 799 (2016). "The primary goal of statutory interpretation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008), citing *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). "[A] court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis v Hartford Accident & Indem*, 444 Mich 638, 644; 513 NW2d 799 (1994). "The proper interpretation of a contract is also a question of law that we review de novo." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014). "[A] court must construe and apply unambiguous contract provisions as written. We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties . . ." *Rory*, 473 Mich at 461.

B. Preservation of the Issue

This issue was preserved as it was raised and addressed in the trial court and in the Court of Appeals.

C. Underinsured Motorist Claimants are Third Party Tort Claimants as They Must Prove a Right to Recover in Tort Before a Right to Recover Underinsured Motorist Benefits Exists

This matter deals with the meaning of MCL 500.2006(4), which provides when UTPA penalty interest should be imposed:

> (4) ***If benefits are not paid on a timely basis the benefits paid shall bear simple interest*** from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, ***if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss*** was received by the insurer at the rate of 12% per annum ***if the liability of the insurer for the claim is not reasonably in dispute***, the insurer has refused payment in bad faith and the bad faith was determined by a court of law. . . . [Emphasis added.]

In *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998) and in *Griswold Prop LLC v Lexington Ins Co*, 276 Mich App 551; 741 NW2d 549 (2007), lv den 480 Mich 1044 (2008), this Court and the Court of Appeals clarified that MCL 500.2006(4) included two potential classifications of claimants: 1) "the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance"; and 2) third-party tort claimants. In turn, this Court and the Court of Appeals concluded that the statute's restriction on the applicability of penalty interest to claims that are "reasonably in dispute" only applied to the latter class of claimants. In *Yaldo*, this Court recognized the distinction between cases involving tort claims and those involving only application of a contract:

> Defendant's claim that our holding would negate the "reasonably in dispute" language of MCL 500.2006(4); MSA 24.12006(4) is based on a misreading of the statute. Its express terms indicate that the language applies only to third-party tort claimants. ***Where the action is based solely on contract***, the insurance company can be penalized with twelve percent interest, even if the claim is reasonably in dispute. [*Yaldo*, 457 Mich at 348 n4, emphasis added.]

Griswold determined that the noted discussion in *Yaldo* was not dictum but was, instead, binding precedent. The Court of Appeals reiterated the ruling from *Yaldo*:

> Thus, we follow the reasoning in *Yaldo* and find that the "reasonably in dispute" language of MCL 500.2006(4) applies only to third-party tort claimants; if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance, and benefits are not paid on a timely basis, the claimant is entitled to 12 percent interest, irrespective of whether the claim is reasonably in dispute. [*Griswold*, 276 Mich App at 566, citation omitted.]

The question presented in this case is which of these two classifications underinsured motorist claimants fall within. The Court of Appeals in this case properly followed the plain language and intent of the statute and the precedent from this Court in *Yaldo* to find that underinsured motorist claimants are third-party tort claimants for purposes of MCL 500.2006(4). This conclusion is the only possible conclusion based on the functioning of the underinsured motorist system and the language of the statute.

It is well recognized that the purpose of uninsured and underinsured motorist coverage is to protect against the short fallings of other motorists in obtaining sufficient insurance coverage to adequately compensate for injuries they cause: "Broadly stated . . . the purpose of underinsured motorist coverage is to protect the named insured and other additional insureds from suffering an inadequately compensated injury caused by an accident with an inadequately insured automobile." *Doyle v Metro Prop & Cas Ins Co*, 252 Conn 79, 84; 743 A2d 156 (1999).[2] Essentially, the insured is purchasing insurance to insure all ***the other drivers*** on the road. Pursuant to this purpose, the underinsured motorist insurer steps into the shoes of the tortfeasor's insurer and ***acts as if it provided insurance to that tortfeasor***. This distinguishes underinsured motorist and uninsured motorist coverage from traditional first-party insurance. While the insured pays for the policy, he or she is actually in the role of a third-party tort claimant that must prove his or her right to recovery as would any other tort claimant. This requirement is contained in the terms of the underinsured motorist coverage, ***which only provides coverage when an insured is legally entitled to recover from a tortfeasor***: "We will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured' vehicle. . . ." (Appendix 5, p 1)

To meet this requirement, the insured would first have to prove the fault of the other driver:

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[2] "The [Uninsured/Underinsured Motorist] statute must be interpreted consistently with its purpose, that is, to protect the insured from the misfortune of being involved in an accident with a fiscally irresponsible driver, and to ensure that when an insured purchases mandatory UM/UIM coverage, he or she is guaranteed at least that amount of recovery regardless of a lower level of liability insurance purchased by a tortfeasor. Stated differently, such coverage is designed to guarantee the protection of an injured insured against the possibility that a tortfeasor, over whom the insured has no control, purchases inadequate amounts of liability coverage." *Progressive Cas Ins Co v MMG Ins Co*, 197 Vt 253, 268; 103 A3d 899 (2014). "[T]he underlying purpose of UIM coverage. . . is to give the insured the recovery he or she would have received if the underinsured motorist had maintained an adequate policy of liability insurance." *Corr v Am Family Ins*, 767 NE2d 535, 540 (Ind, 2002).

"he or she must be able to establish that the uninsured motorist caused his or her injuries and would be liable in tort for the resulting damages." *Adam*, 311 Mich App at 535, see also *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 465-466; 430 NW2d 636 (1988). The underinsured motorist claimant bears the burden of proof regarding tort liability in every case and is never directly entitled to benefits under the insurance policy. Even if the underinsured motorist claimant has filed suit and prevailed against the underlying tortfeasor, this does not automatically entitle further coverage under the underinsured motorist policy. The uninsured/uninsured motorist coverage insurer is not bound by the ruling from that case by *res judicata*. For purposes of res judicata "[a] second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Sewell v Clean Cut Mgmt*, 463 Mich 569, 575; 621 NW2d 222 (2001). The uninsured/underinsured motorist insurer would not be "the same party" as the underlying tortfeasor. Therefore, res judicata would not apply. *Id.*; *Janiew v Detroit Auto Inter-Ins Exch*, 41 Mich App 579, 581; 200 NW2d 464 (1972).[3] Thus, in order to be entitled to benefits, the claimant must ***separately*** prove his tort case against the alleged tortfeasor ***each time an underinsured motorist claim is made***. Given that the claimant has to prove a third-party tort case in every claim, he or she has to be considered "***third party tort claimant***" for purposes of MCL 500.2006(4). The Court of Appeals properly applied the language of the statute as written. *McCormick v Carrier*, 487 Mich 180, 191-192; 795 NW2d 517 (2010).

When construing a statute, the only real goal of the Court is to effectuate the intent of the

[3] See also *Rivera v Esurance Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2007 (Docket No. 274973) 2007 WL 2120527 (Appendix 22), slip op p 4: "That is not the case here. Defendant [underinsured motorist insurer] and the third-party tortfeasor's rights and interests are not the same; therefore, they are not in privity for purpose of the doctrine of res judicata."

Legislature: The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Ameritech Mich v PSC (In re MCI)*, 460 Mich 396, 411; 596 NW2d 164 (1999). "When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Bank of Am, NA v First Am Title Ins Co*, 499 Mich 74, 85; 878 NW2d 816 (2016). In this case, the Legislature expressed a clear intent to distinguish between parties that have to prove a third party tort claim and those who do not. The Court of Appeals properly respected this distinction and enforced MCL 500.2006(4) as written. *McCormick*, 487 Mich at 191-192.

Common sense tells us that the plain language interpretation applied by the Court of Appeals to require the application of the reasonably in dispute language to underinsured motorist claim is the appropriate interpretation as it is the only functional way to apply the statute. "[A] court must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis*, 444 Mich at 644. The purpose of the UTPA penalty interest is to punish ***unreasonable*** delay by an insurer: "The statute referred to by plaintiff is in the nature of a penalty to be assessed against insurers for dilatory practices in settling meritorious claims." *Fletcher v Aetna Cas & Surety Co*, 80 Mich App 439, 445; 264 NW2d 19 (1978), lv den 403 Mich 857 (1978). In the case of an underinsured motorist, there can be no unreasonable delay until ***after*** the claimant has proven the tort case. But this duty to prove the tort case is not the only requirement that the claimant must meet to obtain benefits. He or she would also be required to prove that he or she suffered a serious impairment in excess of the no fault threshold. Tort liability exists in Michigan only if the insured party has a threshold injury:

> A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured

> person has suffered death, serious impairment of body function, or permanent serious disfigurement. [MCL 500.3135.]

This Court has indicated that this requirement must be met in order for uninsured/underinsured motorist coverage to apply:

> We hold that uninsured motorists are subject to tort liability for noneconomic loss only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135; MSA 24.13135. On the basis of the insurance agreement between the parties at bar, we hold that the insured party is not entitled to damages for noneconomic loss unless his injuries meet the threshold set forth in § 3135. [*Auto Club Ins Ass'n*, 431 Mich at 451.[4]]

In addition to these requirements, the policy requires exhaustion of the underlying insurance coverage: "We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted . . . ." (Appendix 5, p 1) Thus, the underinsured motorist claimant would be required to take the extra step to show that, all underlying coverage was completely exhausted by any settlement or judgment. But on top of this, to claim additional underinsured benefits on top of the exhausted underlying policy, the claimant would have to show that ***not only did the claimant suffer a threshold injury, but also that that injury resulted in damages greater than the coverage already provided by the underlying***

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[4] See also *Schenck v Asmar*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2014 (Docket No. 315053) 2014 WL 2972048, lv den 497 Mich 954 (2015) (Appendix 23), slip op p 2: "The present case involves an underinsured motorist claim by plaintiff against State Farm. Such a policy allows an individual to collect from their own insurance carrier in the amount that would be permitted in a suit against the at-fault driver. See *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005). Under the no-fault act, the at-fault driver is liable for noneconomic loss when 'the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.' MCL 500.3135(1). The issue in the present case is whether there was a serious impairment of body function. The no-fault act provides that 'a 'serious impairment of body function' is 'an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.'' *McCormick v Carrier*, 487 Mich 180, 194-195; 795 NW2d 517 (2010). 'Determining the effect or influence that the impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the incident.' *Id.* at 202."

insurance policy. This would require the submission of significant medical records and entails a potentially subjective evaluation of those medical records' meaning as regard to the claimant's ability to live a normal life and the right to recover noneconomic damages.

Michigan is also a comparative negligence state. MCL 600.2959. Therefore, the underinsured motorist claimant would have to prove a lack of comparative negligence because, by statute, any right to recovery would be reduced by the claimant's comparative fault. MCL 600.2959. Further, if he or she were more than 50% at fault for the accident, he or she would have no right to recover at all:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable. I***f that person's percentage of fault is greater than the aggregate fault of the other person or persons***, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 or 6306a, as applicable, and ***noneconomic damages shall not be awarded***. [MCL 600.2959, emphasis added.]

On top of this, pursuant to the terms of the underinsured motorist policy, the claimant would additionally have to prove that the accident involved an underinsured motorist vehicle as defined in the policy. In this case, the MIC underinsured motorist coverage provision provides that MIC will pay "compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured motor vehicle'. . . ." (Appendix 5, p 1) The policy then contains a long and detailed definition of underinsured motor vehicle:

> "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limits for bodily injury liability is less than the limit of liability for this coverage.
>
> However, "underinsured motor vehicle" does not include any vehicle or equipment:
>
> 1. To which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the minimum limit for bodily injury liability specified by the financial responsibility law of the

state in which "your covered auto" is principally garaged.

2. Owned by or furnished or available for the regular use of you or any "family member".
3. Owned by any governmental unit or agency.
4. Operated on rails or crawler treads.
5. Designed mainly for use off public roads while not upon public roads.
6. While located for use as a residence or premises.
7. Owned or operated by a person qualifying as a self-insurer under any applicable motor vehicle law.
8. To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company:
   a. Denies coverage; or
   b. Is or becomes insolvent. [Appendix 5, p 1.]

"It is without dispute that the insured bears the burden of proving coverage. . . ." *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 161 n 6; 534 NW2d 502 (1995). Therefore, the underinsured motorist claimant seeking coverage would bear the burden of providing the evidence to show that the accident involved an underinsured motor vehicle as defined by the policy.

Additionally, the insurance policy contemplates the insurer having a right to trial in nearly every case. Even when a case is arbitrated, the insurer has a right to demand trial on the claimed damages if the arbitration award exceeds "the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which 'your covered auto' is principally garaged" ($20,000 per occurrence/$40,000 per accident in Michigan). (Appendix 5, p 2) Again, insurance policies must be enforced as written. *Rory*, 473 Mich at 461. "[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v United Ins Group Agency*, 468 Mich 459, 468; 663 NW2d 447 (2003). To effectuate the actual agreement between the parties, MIC's right to demand a jury trial on the claimed damages cannot be read out of the policy by requiring MIC to pay merely based on the underinsured motorist claimants' demand for coverage.

Putting this law together in light of the policy terms, in order to claim underinsured motorist benefits, the claimant would have to prove first, that there was an underinsured motor vehicle involved in the accident. Next, the claimant would have to show he or she was entitled to recover from the alleged tortfeasor, i.e. there was liability on the part of the tortfeasor. Next, the claimant would have to prove that he or she was not comparatively negligent in the accident as his or her right to recovery would be reduced by his or her percentage of fault and would be completely precluded if that percentage were greater than 50%. Next, the claimant would have to prove that his or her resulting damages amounted to a threshold injury. Next, the claimant would have to prove the amount of his or her noneconomic damages. On top of this, he would have to prove exhaustion of the underlying policy and entitlement to further noneconomic compensation above what was already obtained from the underlying tortfeasor. The policy specifically contemplates requiring the claimant to prove their claim/damages at trial before having a right to recover. Simply, the steps required before underinsured motorist coverage exists makes automatic application of MCL 500.2006(4) penalty interest without the ability to dispute coverage untenable. It was never the intent of the Legislature to impose automatic penalty interest in claims requiring such detailed and complicated proofs prior to the right to receive benefits. This is exactly why the Legislature included the "reasonably in dispute" provision of MCL 500.2006(4).

The parties have contracted to the burden of proof placed on the claimant to prove entitlement to recovery under the policy's coverage. Requiring an insured to meet these requirements, which necessarily include proof of his or her tort case, is not a delay by the insurer. And it certainly is not an "unreasonable delay" that MCL 500.2006(4) sought to eliminate. *Fletcher*, 80 Mich App at 445. Imposing liability prior to completion of the litigation of the tort liability would rewrite the contract between the parties contrary to the fundamental freedom to

contract respected in this state. *Rory*, 473 Mich at 468. It would also be contrary to the true goal of statutory interpretation as the actual intent of the statute of punishing dilatory insurers would not be effectuated. *Marquis*, 444 Mich at 644. Given that the Court of Appeals applied the statute as written to effectuate the actual intent of the Legislature and respected the parties' freedom to contract regarding the burden of proof in an underinsured motorist claim, the Court of Appeals' decision was proper. This Court should deny leave to appeal in this matter.

D. An Insured is Only Entitled to Recover UTPA Penalty Interest Regardless of Whether the Claim was Reasonably in Dispute if He or She is Directly Entitled to Benefits

"The primary goal of statutory interpretation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute." *Allison*, 481 Mich at 427. The initial consideration for determining the legislative intent is the language actually chosen by the Legislature: "The starting point in every case involving construction of a statute is the language itself." *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). In this matter, the Court is called on to address the meaning of two classifications of potential claimants provided for in MCL 500.2006(4): 1) "if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance;" and 2) "[i]f the claimant is a third party tort claimant". As noted above, an underinsured motorist claimant has to fall within the second category as he or she is required to prove a right to recover in tort in every single case. As he or she must prove a third-party tort case against the uninsured motorist that the insurer is stepping in to insure, he or she is a third party tort claimant. But in addition to falling under the plain language of the second category, an uninsured motorist claimant also does not fit within the first category as he or she is ***not*** "directly entitled to benefits. . . ." MCL 500.2006(4).

By use of the phrase "directly entitled to benefits," the Legislature made clear that not every insured, individual, or entity is automatically entitled to recover penalty interest regardless

of whether a claim is properly being disputed. It is only those insureds or individuals or entities directly entitled to benefits that are entitled to automatic penalty interest regardless of the reasonableness of the dispute regarding coverage. *Random House Webster's College Dictionary* (2001) defines "directly" as "at once; without delay." *The Oxford Color College Dictionary Second Edition* defines "directly" as "immediately". ***There is no way that uninsured and underinsured motorist benefits could meet these definitions or requirements.*** As outlined above, the right to recover such benefits is not immediate, without delay or at once. Unlike a claimant under a first-party fire loss policy or homeowner/all risk policy where the insured merely has to submit proof of damage to property, the underinsured motorist claimant has to prove an entire tort case, including: 1) the fault of the other driver; 2) the lack of comparative fault; 3) that a no fault threshold injury exists; 4) that he or she suffered noneconomic damages; 5) the amount of those damages; 6) that his or her amount of damages exceeds the recovery from the underlying tortfeasor; ***and*** 7) that the other driver was operating an underinsured motor vehicle as defined in the policy (along with any other contractual requirements agreed to when entering the policy). In addition, the policy provides a right for the insurer to demand a trial on the claimed damages if the arbitration award is over the $20,000 minimum limit. (Appendix 5, p 2) There is no way this multistep process can meet the meaning of "directly." Because an underinsured motorist claimant is not "directly" entitled to benefits, he cannot fall within the first category of potential claimants. Instead, the underinsured motorist claimant is a "tort claimant" as mentioned in the second part of the statute.

The statute's use of the phrase "directly entitled to benefits" cannot be ignored so as to conclude that, because the Nickolas were "insureds," penalty interest automatically applies. "Whenever possible, every word of a statute should be given meaning. And no word should be

treated as surplusage or made nugatory." *Apsey v Mem'l Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). Under this rule of law, the "directly entitled to benefits" requirement cannot be ignored. And, as the Nickolas were not insureds "directly entitled to benefits" the trial court and the Court of Appeals properly applied the reasonably in dispute requirement to their claims.

Appellant may attempt to argue that the last antecedent rule applies so that "directly entitled to benefits" is not read to modify the word "insured" in the MCL 500.2006(4). "This rule of construction provides that a modifying clause is confined to the last antecedent unless something in the subject matter or dominant purpose [of the statute] requires a different interpretation." *Dessart v Burak*, 470 Mich 37, 41; 678 NW2d 615 (2004), citation omitted. The rule should not apply, however, when its application would create "conceptual difficulties" in the meaning of the statute. *Id.* at 43. The last antecedent rule cannot be applied to this statute because the provision would make no sense. Again, the provision in question is: "If the claimant is the insured or an individual or entity directly entitled to benefits. . . ." The phrase "directly entitled to benefits" cannot be limited to its last antecedent, which is "entity" as this would leave "individual" unmodified. This would mean that any "individual" claimant would be entitled to automatic penalty interest. But a third-party tort claimant would be an "individual." This would mean that the reasonably in dispute language would never apply because each third-party tort claimant would qualify as an "individual" who could escape the reasonably in dispute requirement under the first sentence of MCL 500.2006(4). On the other hand, reading the statute to require that "directly entitled to benefits" modifies each of the three named groups, insured, individuals, and entities, would give full meaning to each of the provisions and would make clear distinctions between the sentences. Parties directly entitled to benefits would fall within the first sentence and parties required to prove a third-party tort case fall within the second group. Again, this Court strives to

give meaning to every term and word used in the statute while rendering nothing nugatory in the statute. *Apsey*, 477 Mich at 127. Because the Court of Appeals ruling gives meaning to all of the terms of the statute where appellant's interpretation would not, his application should be denied.

E. Automatic Application of Penalty Interest to Underinsured Motorist Claims is Logically and Contractually Untenable and Inconsistent with the Policy Language

An understanding of the distinct insurance claims processes for first-party and third-party insurance claims is helpful in understanding why the Legislature made the policy distinction between these two groups of individuals in MCL 500.2006(4). In first-party insurance claims like the first-party fire insurance claims at issue in *Griswold* and *Yaldo*, the central question is the applicability of the language of the insurance policy contract. The claimant merely has to quantify his or her damages, i.e. determine what property was lost in the fire, and submit that number to the insurer. This is done by the insured submitting a document called a sworn statement in proof of loss. This document sets the dollar amount of the insureds' specific damage claim and is supported by supporting documents like a property inventory and receipts showing ownership of the personal property claimed damaged in the fire. The insurer then merely has to assess the submitted damage number in light of policy provisions and its own inventory of the property. This is easily accomplished within the 60 days set by the UTPA.

Third-party cases not based solely on contract, however, cannot work in the same manner. A party's whose case is dependent on proving a tort case cannot merely submit a number on a proof of loss form to be evaluated by the insurer. Instead, the claimant must prove issues of liability and often esoteric claims such as pain and suffering in order to demonstrate the right to recover noneconomic damages, which is a precursor to the right to recover under the insurance policy. These are not items that can be established by a mere inventory but instead often require litigation or at least extensive discovery through examinations under oath, obtaining pre and post-

accident medical and employment records, and independent medical evaluations of the claimant. An insurer cannot provide a simple list of what must be submitted to effectuate the third-party claim because such a claim requires much more than mere document production to be satisfied.

Uninsured and underinsured motorist claims are the same as any other third-party tort claim. The steps required before underinsured motorist coverage exists makes automatic application of MCL 500.2006(4) to underinsured motorist claimants untenable. The underinsured motorist claimant cannot simply supply medical records or a list of claimed injuries to meet his or her burden to demonstrate entitlement to benefits. Instead, the claimant would have to demonstrate proof of liability of the underlying tortfeasor, lack of comparative fault, a threshold injury, noneconomic damages, the amount of his or her noneconomic damages, exhaustion of the underlying coverage, noneconomic injuries beyond the recovery in the exhausted underlying coverage, and the involvement of an underinsured motor vehicle as defined in the policy (and any other policy conditions required for coverage). This is completely different from a first-party insured directly entitled to benefits, such as an insured claiming property damage following a fire. In the latter case, the insured must merely list the cause of the fire and the items damaged to be entitled to recover under the policy. For the first-party property insured, there is no required litigation regarding liability of third parties, damage thresholds that must be met, or most importantly of all, noneconomic damages. This is the exact opposite from the underinsured motorist tort claimant such as the Nickolas. In fact, the insurance policy specifically contemplates that the insurer has the right to demand trial if the arbitration award is over the $20,000 minimum limit. (Appendix 5, p 2)

The difference between first-party claims and third-party claims is significant. Although both involve benefits, simply put, first-party claims are determined by reference to submitted bills,

while third-party and underinsured claims include noneconomic damages and multiple other issues. First-party claims such as claims for property damage after a fire or Personal Injury Protection insurance ***are all economic claims***. They are merely a matter of a valuation of goods or services, medical services, or wage loss, which can be accomplished through claim forms and records. Third-party claims such as underinsured motorist claims or auto liability claims, on the other hand, ***are claims for noneconomic damages***. Such noneconomic damages cannot be simply quantified. They, instead, require detailed factual development regarding medical, physical, and employment conditions before and after the loss, the general effects on a person's daily life, and other esoteric concepts like pain and suffering. Claims for noneconomic damages cannot be decided through the proof of loss system established for first-party claims, and this is exactly why the Legislature created the distinction it did in MCL 500.2006(4). Because underinsured motorist claims deal with such noneconomic damages, they have to be considered third-party tort claims.

Further, if the insurer faces automatic penalty interest simply by an underinsured motorist claimant submitting a letter claiming benefits as occurred in this case[5], the right to require the claimant to prove liability, noneconomic damages, and the freedom from comparative fault would be read out of the underinsured motorist policy. There is simply no tool by which liability, noneconomic damages, and comparative liability can be judged without detailed investigation into the accident and injuries. This typically requires at least testimony and evidence from the individuals involved and the treating doctors, if not a full forensic investigation. An insurer would never have a sufficient opportunity to investigate so as to defend against a claim within 60 days.

Moreover, appellant's reinterpretation of the statute would shift the burden from the

[5] Appellant claims that the Nickolas' May 7, 2004 letter referencing underinsured motorist benefits was adequate proof of loss "as a matter of law" and that this "triggered the obligation to pay within 60 days." (Supreme Court Application, p 16)

claimant to the insurer. As it stands, the contract requires that the insured prove he or she is entitled to recover in tort: "We will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'underinsured' vehicle. . . ." (Appendix 5, p 1) "It is without dispute that the insured bears the burden of proving coverage. . . ." *Heniser*, 449 Mich at 161 n 6. But if appellant merely has to submit a proof of loss of some kind (or as in this case, a letter demanding benefits accompanied by a release for medical records), ***the burden would then be shifted to the insurer to disprove liability so as to reject the claimant's statement of right to benefits***. This was not the system contracted for between the parties. "We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness'" *Rory*, 473 Mich at 461. It was also not the system contemplated by the Legislature in enacting the UTPA and explained by this Court in *Yaldo*. *Yaldo*, 457 Mich at 348 n4.

Along similar lines, allowing automatic recovery of penalty interest in underinsured motorist cases would eliminate the right to take the case to arbitration. The policy in this case, as in many other underinsured motorist coverage policies, allows for arbitration of disputes regarding the right to underinsured motorist benefits. In this contract, "[e]ither party may make a written demand for arbitration." (Appendix 5, p 2) But MIC would never have the ability to choose arbitration because, in any case that it chose to arbitrate a matter, it would face automatic penalty interest of 12% during the entire arbitration process.

Just like statutes, this Court strives not to render any portion of an insurance contract nugatory: "[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp*, 468

Mich at 468. Considering underinsured motorist claimants not to be third-party tort claimants would render multiple parts of the contract nugatory as it would eliminate the right to arbitration and shift the burden of proving liability. This was not what was intended by the Legislature in enacting the statute and should not be supported by this Court. Leave to appeal should be denied.

F. The Nickolas Never Submitted a Satisfactory Proof of Loss

The Nickolas never submitted a proof of loss. All that appellant has pointed to is a May 7, 2004 letter referencing underinsured motorist benefits. (Supreme Court Application, p 16) But this cannot be a sufficient proof of loss. First, as of May 7, 2004, the Nickolas had not even settled with Smith. In fact, they did not do so ***for over another six months***, finally settling on November 21, 2004. (Appendix 4) Thus, ***the Nickolas were not even eligible to start the process of claiming underinsured motorist benefits as the policy required settlement with the underling tortfeasor and exhausting his insurance coverage***, neither of which had occurred. (Appendix 5, p 1) Second, the Nickolas had not proven tort liability, threshold injuries, or especially noneconomic damage injuries exceeding the future settlement with Smith. Therefore, they never complied with the contractual requirements for coverage. MIC properly rejected the letter sent asking for benefits and stated the reason for that rejection. (Appendix 7)

These facts do not even consider the ***at least seven years and six months of delays by the Nickolas and appellant*** in this matter. There are two possible explanations for the delay in this case: either the Nickolas went to their graves in agreement with MIC's assessment that their injuries did not warrant further compensation above the no fault benefits and the $20,000 recovery that they each received or they and their subsequent representative had the plan all along to delay this case in order to gain 12% interest through the course of the years of delay. Under either scenario, the Nickolas and their subsequent representative do not have clean hands, and cannot fairly claim a right to recover UTPA interest. The purpose of the UTPA is to punish ***unreasonable***

delay by the insurer. *Fletcher*, 80 Mich App at 445. Because the Nickolas did not submit sufficient evidence to prove their entitlement to benefits until the arbitration and because all delays existing in this case were caused by the Nickolas and appellant, UTPA penalty interest is inapplicable to this matter. The Court of Appeals decision in this matter was correct, and leave to appeal should be denied.

II. The Court of Appeals Decision in this Case is Consistent with *Yaldo v North Pointe Ins Co*, 457 Mich 341 (1998), and *Griswold Properties LLC v Lexington Ins Co*, 276 Mich App 551 (2007)

A. Standard of Review

"This Court reviews de novo questions of statutory interpretation. . . ." *Jesperson*, 499 Mich at 34. "The proper interpretation of a contract is also a question of law that we review de novo. *Miller-Davis Co*, 495 Mich at 172.

B. Preservation of the Issue

This issue was preserved as it is a component of the first issue raised and addressed in the trial court and in the Court of Appeals.

C. Reversal of the Court of Appeals Would Require Reversal of *Yaldo*

Although *Yaldo* did not directly address underinsured motorist coverage, it did provide the basic legal groundwork built on by the Court of Appeals in this case to determine when the "reasonably in dispute" provision applies. This case is controlled by that precedent. Specifically, this Court ruled in *Yaldo* regarding the reasonably in dispute language:

> Defendant's claim that our holding would negate the "reasonably in dispute" language of MCL 500.2006(4); MSA 24.12006(4) is based on a misreading of the statute. Its express terms indicate that the language applies only to third-party tort claimants. ***Where the action is based solely on contract***, the insurance company can be penalized with twelve percent interest, even if the claim is reasonably in dispute. [*Yaldo*, 457 Mich at 348 n4, emphasis added.]

The Court of Appeals in *Griswold* followed directly in line with *Yaldo*. In fact, *Griswold*

specifically quoted this Court's holding regarding actions based solely on contract ***and found it to be binding precedent***:

> The *Yaldo* Court stated specifically:
>
> > Defendant's claim that our holding would negate the "reasonably in dispute" language of MCL 500.2006(4); MSA 24.12006(4) is based on a misreading of the statute. Its express terms indicate that the language applies only to third-party tort claimants. Where the action is based solely on contract, the insurance company can be penalized with twelve percent interest, even if the claim is reasonably in dispute. [*Yaldo*, supra at 348 n 4.]
> >
> > * * *
>
> [T]he *Yaldo* Court intentionally addressed the issue as raised by the defendant. Thus, even though the *Yaldo* Court's discussion of the applicability of the reasonable-dispute provision in MCL 500.2006(4) was not necessarily decisive of the controversy, it was certainly germane to the controversy. On that basis, we hold that the statement in *Yaldo* was not dictum, that the *Arco* Court erred by declining to adhere to *Yaldo*, and that the *Griswold* Court correctly concluded that *Yaldo* controls on the issue of the applicability of the reasonable-dispute provision in MCL 500.2006(4). MCR 7.215(J)(1). [*Griswold*, 276 Mich App at 556-557, 564, citation omitted.]

The key ruling of this Court in *Yaldo* was that a party is entitled to automatic penalty interest regardless of a reasonable dispute only in cases where their claim was based "***solely***" on contract. *Yaldo*, 457 Mich at 348 n4. As outlined in detail above, underinsured motorist claims ***are not based solely on contract***. Instead, these claims are actually based on a tort action against the alleged underlying tortfeasor. As outlined above, while a claim based entirely in contract essentially boils down to a determination of inventory and a dollar amount for the claim, a tort claim requires proof of esoteric things like pain and suffering and threshold injuries that cannot be quantified on a mere piece of paper submitted to the insurer. This is exactly why this Court made the distinction that it did in *Yaldo* when stating that only in claims "***based solely on contract***" can the insurance company "be penalized with twelve percent interest, even if the claim is reasonably in dispute." *Id.*

Yaldo was correctly decided and controls this case. The Nickolas did not purchase "first

party insurance" because such insurance only involves claims "based solely on contract." *Id.* Instead, as underinsured motorist claimants, they step into the shoes of third-party tort claimants required to prove a third-party tort case, including their noneconomic damages.

This is exactly why the system proposed by appellant is illogical and not functional. Appellant has claimed that the Nickolas' May 7, 2004 letter referencing underinsured motorist benefits was adequate proof of loss "as a matter of law" and that this "triggered the obligation to pay within 60 days." (Supreme Court Application, p 16) But this argument fails on its face for multiple reasons. First, as of May 7, 2004, the Nickolas had not even settled with Smith. In fact, they did not do so ***for over another six months***, finally settling on November 21, 2004. (Appendix 4) Thus, at the time of this supposed establishment of a right to benefits as a matter of law triggering the duty to pay within 60 days, ***the Nickolas were not even eligible to start the process of claiming underinsured motorist benefits as the policy required settlement with the underling tortfeasor and exhausting his insurance coverage***, neither of which had occurred. (Appendix 5, p 1) Put simply, appellant is arguing that MIC had to pay benefits ***four months prior to coverage existing under the terms of the policy***. This position is untenable, especially in light of the second problem with this position.

The second major problem with appellant's position is that there is no way to establish what MIC was supposed to pay as of his arbitrarily chosen date, May 7, 2004. Even forgetting that the Nickolas had not settled with Smith or exhausted his policy at that time, there would be no amount established for MIC to pay. Was MIC automatically required to pay the policy limits for both claims because the Nickolas had sent a letter mentioning underinsured motorist benefits? From the Nickolas' actual underinsured motorist coverage demand letter, which demanded $80,000 for both George and Thelma, this seems to be appellant's position. (Appendix 6)

Obviously, this would have been inherently unfair as Thelma ended up recovering less than half of that amount after arbitration. (Appendix 18) The system proposed by appellant is unworkable. Does MIC owe interest on the $33,000 actually recovered, the $80,000 demanded, or some unknown other number never quantified. The simple fact is that underinsured motorist claims are based on noneconomic damages that cannot be known or quantified at the time of the demand. Such inherent uncertainly in tort cases is exactly why this Court limited automatic penalty interest regardless of reasonable disputes to claims "***based solely on contract***". *Yaldo*, 457 Mich at 348 n4, emphasis added.

"Stare decisis is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998), quoting *Payne v Tennessee*, 501 US 808, 827; 115 L Ed 2d 720; 111 S Ct 2597 (1991). This is especially true in cases interpreting statutes where the Legislature is free to act to amend statutes when court interpretations are inconsistent with the Legislature's intent. *Hohn*, 524 US at 251. The first question in reviewing precedent is to determine if the case was wrongly decided. *Robinson*, 462 Mich at 464. In this case, *Yaldo* was not wrongly decided. Instead, as repeatedly laid out above, *Yaldo* properly respected the plain language of the statute and the recognized how insurance claims work in stating the "based solely on contract" standard. *Yaldo*, 457 Mich at 348 n4; *Griswold*, 276 Mich App at 556-557, 564. But even if *Yaldo* were wrongly decided, the Court would have to consider "whether the decision at issue defies 'practical workability,' [and] whether reliance interests would work an undue hardship." *Robinson*, 462 Mich at 464. Neither consideration supports abandoning *Yaldo*. Again, as laid out above, *Yaldo*'s "based solely on contract" holding is the only workable system as there

would be no practical means for uninsured motorist tort claimants to submit a proof of loss showing entitlement to recovery as they are required to prove a tort case prior to having a right to collect under the policy. The insurance industry has also relied on *Yaldo* in setting rates for insurance coverage. If insurers are suddenly required to pay 12% interest in every uninsured or underinsured motorist claim or lose the right to litigate the liability issues, they will be forced to drastically increase the premium costs for uninsured and underinsured motorist benefits in order to cover that risk and/or the increased cost in actually applying the terms of the policy as written. Creating this sudden spike in insurance costs will be detrimental to the people of this State and was not intended by the Legislature in enacting the UTPA.

As the Nickolas claims were not based solely on contract but were instead third-party tort claims, the Court of Appeals properly applied *Yaldo* and affirmed the trial court's decision not to impose UTPA penalty interest. Appellant has not established a basis for this Court to overturn its now well-established precedent from *Yaldo*. Therefore, leave should be denied.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals properly applied MCL 500.2006 in this matter. There is no basis or need for this Court to act. MIC respectfully requests that this Honorable Court deny leave to appeal and impose any costs associated with this appeal on appellant.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading has been electronically filed on the below listed date with the Clerk of the Court via the Electronic Case Filing system which will send notice of filing to all attorneys of record and by mailing the same in the US Mail, first class, postage prepared, to said attorneys at their addresses disclosed by the pleadings of record herein.

/s/ *Dana L. Pavelek*
Legal Assistant, Harvey Kruse, P.C.
DATED: July 6, 2016

Respectfully submitted,

BY: */s/ Michael F. Schmidt*
Michael F. Schmidt P25213
Nathan Peplinski P66596
Harvey Kruse PC
mschmidt@harveykruse.com
npeplinski@harveykruse.com
1050 Wilshire Drive, Suite 320
Troy, Michigan 48084-1526
(248) 649-7800

Appendix 1

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GEORGE NICKOLA and
THELMA NICKOLA

05 - 81192

Plaintiffs, FILE NO. 05- -CK

v JUDGE RICHARD B. YUILLE P-22664

MIC GENERAL INSURANCE CORPORATION
d/b/a GMAC INSURANCE

Defendant.

JOHN D. NICKOLA (P18295)
Attorney for Plaintiff
1015 Church Street
Flint, MI 48502
(810) 767-5420
(810) 767-4719

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint

COMPLAINT FOR DECLARATORY RELIEF AND/OR DAMAGES

NOW COMES Plaintiffs, George and Thelma Nickola, by thier attorney, John D. Nickola, and for thier Complaint for Declaratory Relief and/or Damages, states as follows:

1. That in this case, a controversy exists in excess of Twenty-Five Thousand ($25,000.00) Dollars, within the jurisdiction of the County of Genesee, State of Michigan, and the Genesee County Circuit Court is a proper Court of record to declare the rights and other legal relationships of the interested Parties.

2. That Plaintiffs, George and Thelma Nickola are husband and wife at all pertinent times were residents of Midland County, Michigan.

3. That the Defendant, MIC General Insurance Corporation, d/b/a GMAC Insurance (hereinafter GMAC) is domiciled and licensed in the State of Missouri and conducts business in Genesee County, State of Michigan.

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

4. That on or about the 13th day of April 2004, Plaintiffs were insured with the Defendant GMAC, Policy Number 0318316A03M01, said automobile insurance policy providing coverage for under-insured motorist coverage for the protection of said Plaintiffs, George and Thelma Nickola. (See Attached **Exhibit A**, Declaration Page)

5. That on or about the April 13, 2004 the Plaintiff Thelma Nickola was a passenger in a vehicle being driven by George Nickola, said vehicle being insured by the above policy.

6. That at the above time and place George Nickola was operating his vehicle near the intersection of Corunna Road and Elms Road, in the County of Genesee and State of Michigan when George Nickola's vehicle was struck by an oncoming vehicle that failed to yield the right of way to oncoming traffic, said vehicle being owned and driven by Roy Smith.

7. That as a result of the striking of the Nickola vehicle Plaintiff, George Nickola , sustained serious, permanent and/or painful injuries to his person, resulting in a serious and/or permanent impairment of a bodily function, and/or serious and/or permanent disfigurement and the loss of consortium of his wife's society, companionship and services.

8. That as a result of the striking of the Nickola vehicle Plaintiff, Thelma Nickola , sustained serious, permanent and/or painful injuries to her person, resulting in a serious and/or permanent impairment of bodily function, and/or serious and/or permanent disfigurement and loss of consortium of her husband's society, companionship and services.

9. That the maximum automobile liability insurance coverage limit that was available from the tortfeasor, Roy Smith was Twenty Thousand dollars ($20,000.00) to George Nickola and Twenty Thousand dollars ($20,000.00) to Thelma Nickola and the amount of $20,000.00 was paid by the tortfeasor to each of the Plaintiffs herein with the Defendant's knowledge, consent and acquiescence. (See Attached **Exhibit B**)

10. That Defendant GMAC's insurance policy, referenced above, provided **under**insured motorist coverage to George and Thelma Nickola in the amount of One Hundred Thousand dollars ($100,000) for each person, Three Hundred Thousand dollars ($300,000.00) per accident (Refer to Exhibit A, Declaration Page.)

11. That Plaintiffs, George and Thelma Nickola were underinsured motorists pursuant to the definitions set forth in Defendant GMAC's policy.

12. That Defendant GMAC's policy provided that if the insurer (Defendant GMAC) and the insured (George and Thelma Nickola) do not agree whether the insured person is legally entitled to recover damages or as to the amount of damages, either party may make a written demand for arbitration. (See Underinsured Motorist Protection Section, Attached Exhibit C)

13. That on February 22, 2005 Plaintiffs did make a written demand for arbitration of George and Thelma Nickola's underinsured motorist claims against the Defendant GMAC (See Attached Exhibit D)

14. That on March 2, 2005 Defendant GMAC denied Plaintiff's demand for arbitration and in response stated "we do not agree to placing this matter into an arbitration forum" (See attached exhibit E)

15. That the Plaintiffs have each complied with all of the provisions of the said policy.

16. That there exists an actual controversy which requires a declaration of the rights and legal relations of the parties herein.

WHEREFORE, the Plaintiff prays that this Court will:

A. Issue an Order declaring that the rights and legal relations of the parties herein; and/or

B. Issue an Order directing the Defendant GMAC, to arbitrate this matter in accordance with the terms under the policy, and/or;

C. To enter Judgment on behalf of the Plaintiff, George Nickola, in the amount of Eighty Thousand ($80,000.00) Dollars, together with all costs, interest and attorney fees allowed by law;

D. To enter Judgment on behalf of the Plaintiff, Thelma Nickola, in the amount of Eighty Thousand ($80,000.00) Dollars, together with all costs and interest allowed by law;

E. That this Court shall retain jurisdiction to enforce compliance and/or make other determinations, orders and judgments necessary to fully adjudicate the rights of the Plaintiffs herein.

Date: 4/8/05

JOHN D. NICKOLA (P18295)
Attorney for Plaintiffs

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Appendix 2

GMAC INSURANCE

DECLARATIONS PAGE

GM EMPLOYEE
VEHICLE INSURANCE
P.O. BOX 66937
ST. LOUIS, MO 63166-6937

To Report Claims Toll Free 1-800-642-2886
For Other Services or Information 1-800-642-6464

Policy Period 12:01 AM Standard Time (see reverse side)
From 03/15/2004 To 03/15/2005
POLICY NUMBER 0318316A04M

GEORGE NICKOLA
362 W ISLAND DR
BEAVERTON MI 48612-8525

PERSONAL AUTOMOBILE

VEHICLE INSURANCE

A VALUED CUSTOMER SINCE 2001

* * RENEWAL DECLARATIONS PAGE * *

... THANK YOU FOR YOUR BUSINESS ... 48612852507173 MI20040213

COVERAGE AFFORDED	LIMITS	VEHICLE #1 1996 CVAN ASTRO 1GBDM19W5T8112-602	VEHICLE #2 1989 CHEV C1500 1GCDC14K6KE113-564	VEHICLE #3
LIABILITY				
BODILY INJURY				
EACH PERSON	$100,000	107.00	112.00	
EACH ACCIDENT	$300,000			
PROPERTY DAMAGE				
EACH ACCIDENT	$100,000	12.00	13.00	
ADDITIONAL PROPERTY DAMAGE		INCLUDED	INCLUDED	
PERSONAL INJURY PROTECTION TWO OR MORE FAMILY MEMBERS WAIVER OF WORK LOSS ANNUAL INCOME UNDER $3,000		290.00	374.00	
PROPERTY PROTECTION INS		15.00	15.00	
UNINSURED MOTORISTS BI				
EACH PERSON	$100,000	22.00	22.00	
EACH ACCIDENT	$300,000			
UNDERINSURED MOTORISTS BI				
EACH PERSON	$100,000	20.00	20.00	
EACH ACCIDENT	$300,000			
DAMAGE TO YOUR AUTO				
OTHER THAN COLLISION	$100 DED	193.00	NO COVERAGE	
BROADENED COLLISION	$500 DED	318.00	NO COVERAGE	
VEHICLE PREMIUM		$977.00	$556.00	
VEHICLE PREMIUM BASED ON -USE OF VEHICLE -RATED DRIVER -DISCOUNTS APPLIED		PLEASURE ADULT ANTI-LOCK BRAKE BELT PLEDGE MULTI-VEHICLE	PLEASURE ADULT BELT PLEDGE MULTI-VEHICLE HOMEOWNER	

SEE NEXT PAGE

#1 _____ #2 _____ #3 _____
Loss Payees

17 803100 10 803100

Underwritten by: MIC GENERAL INSURANCE CORP.

GMAC INSURANCE

DECLARATIONS PAGE
PAGE 2

GM EMPLOYEE
VEHICLE INSURANCE
P.O. BOX 66937
ST. LOUIS,MO 63166-6937

To Report Claims Toll Free 1-800-642-2886
For Other Services or Information 1-800-642-6464

Policy Period 12:01 AM Standard Time (see reverse side)
From 03/15/2004 To 03/15/2005
POLICY NUMBER 0318316A04M

GEORGE NICKOLA
362 W ISLAND DR
BEAVERTON MI 48612-8525

PERSONAL AUTOMOBILE

VEHICLE INSURANCE

A VALUED CUSTOMER SINCE 2001

* * RENEWAL DECLARATIONS PAGE * *

... THANK YOU FOR YOUR BUSINESS ... 486128525O7173 MI20040213

COVERAGE AFFORDED	LIMITS	VEHICLE #1 1996 CVAN ASTRO 1GBOM19W5T8112- 602	VEHICLE #2 1989 CHEV C1500 1GCDC14K6KE113- 564	VEHICLE #3
-DISCOUNTS APPLIED		AIRBAG HOMEOWNER PAID IN FULL	PAID IN FULL	
)TAL POLICY PREMIUM	$1,533.00			

#1 _____ #2 _____ #3 _____
Loss Payees

17 803100 10 803100

derwritten by: MIC GENERAL INSURANCE CORP.

4336(10011994)

Endorsements made a part of this policy at issuance:

1779(10012002)	4886(07012003)	1933(05012000)	4935(08012001)	6159(03012000)
5933(05012000)	6451(10012001)	2439(06011994)	2441(11011994)	1880(04011980)
4497(12012000)	2082(12011989)	4477(08011987)	1825(01011988)	4658(02012000)
5962(04012000)	6637(09012003)	6638(09012003)		

4370(10011994)

POLICY PERIOD: (Applicable in all states except Texas and Wisconsin)

The policy shall expire as shown in Policy Period of the declarations, except that it may be continued in force for successive policy periods by the payment of the required renewal premium in advance of each such period and the acceptance of such premium by a duly authorized representative of the company. Each such policy period shall begin and expire at 12:01 A.M. Standard Time at the address of the named insured on the declarations. The premium shown in the policy is for the stated policy period. If renewed, the successive policy periods shall be of the same duration as shown on the declarations.

LOSS PAYABLE CLAUSE: (Applicable in all states except California, Virginia and Tennessee)

Any physical loss or damage payable under this policy shall be paid as interest may appear to you and the loss payee shown in the declarations. When we pay the loss payee we shall to the extent of the payment, be subrogated to the loss payee's rights of recovery. This insurance covering the interest of the loss payee shall not become invalid because of your fraudulent acts or omissions unless the loss results from your conversion, secretion or embezzlement of your covered auto. However, we reserve the right to cancel the policy as permitted by policy terms and the cancellation shall terminate this agreement as to the loss payee's interest. Upon termination of the policy or the coverages insuring the loss payee's interest, we will give at least 10 days advance notice of termination to the loss payee (20 days in the state of Arkansas). Any continuance of coverage protecting the loss payee's interest shall terminate on the effective date of the policy contract of insurance binder for similar coverage by another insurance carrier.

Please refer to your policy for a complete description of provisions which control all policy terminations and expirations.

4337(10011994)

I HEREBY CERTIFY THAT THIS IS A TRUE AND EXACT REPRODUCTION OF THE DECLARATIONS SHOWING COVERAGES CARRIED BY THE ABOVE NAMED INSURED AS OF APRIL 13, 2004

PEGGY O'NEAL CALL CENTER SUPPORT SUPERVISOR

COUNTY OF ST. LOUIS
STATE OF MISSOURI

SWORN TO AND SUBSCRIBED BEFORE ME THIS 4th DAY OF May 2005

NOTARY PUBLIC Denise Weber

DENISE WEBER
Notary Public - Notary Seal
STATE OF MISSOURI
St. Charles County
My Commission Expires: June 20, 2008

Appendix 3

GMAC Insurance

October 14, 2004

John D. Nickola, Esquire
1015 Church Street
Flint, MI 48502

RE:		
	Company Name:	MIC General Insurance Company
	Claim Number:	7297040
	Insured:	Nickola,George
	Claimant:	Nickola,George & Nickola,Thelma J
	Date of Loss:	04/13/2004

Dear Mr. Nickola:

This letter follows our investigation into your request to accept the tortfeasor's policy limits of $20,000. Please be advised that you have our permission to accept the Progressive policy limits, as the tortfeasor is uncollectable.

The $20,000 will resolve any outstanding third party claims, except the umbi coverage and pip benefits.

Thank you, for your attention to these matters and we ask that you forward a copy of the signed release once this matter is resolved.

Sincerely,

Gregory D. Edwards
Inventory Manager
(888) 737-8460, Ext. 5013
(248) 226-5013 Fax: (248) 226-5550
Motors Insurance Company a GMAC Insurance Company

Appendix 4

PROGRESSIVE®

FULL RELEASE OF CLAIMS

Claim #042709197

KNOW ALL BY THESE PRESENTS, THAT **George Nickola, a married man and his wife, Thelma Nickola, both individually and as husband and wife** for and in consideration of the payment **of Twenty Thousand Dollards and no cents ($20,000.00)**, the receipt and sufficiency of which is hereby acknowledged, does (do) hereby for myself (ourselves) and for my (our) heirs, executors, administrators, successors, assigns and any and all other persons, firms, employers, corporations, associations, or partnerships release, acquit and forever discharge **Roy D. Smith** and his, her, their or its agents, servants, successors, heirs, executors, administrators, from claims, actions, causes of actions, demands, rights, damages, costs, loss of wages, expenses, hospital and medical expenses, loss of consortium, loss of service, and any compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of an accident which occurred on or about **April 13, 2004**, at or near **Corunna Road and Elms Road in Flint, Michigan.**

It is understood and agreed that this settlement is in full compromise of a doubtful and disputed claim as to both questions of liability and as to the nature and extent of the injuries and damage, and that neither this release, nor the payment pursuant thereto, shall be construed as an admission of liability, such being denied.

The undersigned hereby declare(s) and represent(s) that the injuries are or may be permanent and that recovery therefrom is uncertain and indefinite and in making this release, it is understood and agreed that the undersigned rely(ies) wholly upon the undersigned's judgment, belief, and knowledge of the nature, extent, effect and duration of said injuries and liability therefor and is made without reliance upon any statement or representation of the party or parties being released, or their representatives, or by any physician or surgeon by them employed.

This release does not include any claim for any applicable Michigan No-Fault benefits nor include any claim that George and/or Thelma Nickola have against any insurance company for any and all applicable uninsured/underinsured motorist coverage and/or other applicable benefits that may be due and/or available to them.

The undersigned further declare(s) and represent(s) that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this release contains the entire agreement between the parties hereto, and that the terms of this release are contractual and not a mere recital.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

George Nickola 11/21/04 — 11-21-04

Signed, George Nickola, claimant — Date — Witness — Date

Thelma J. Nickola 11/21/04 — 11-20-04

Signed, Thelma Nickola, spouse — Date — Witness — Date

PROGRESSIVE®

FULL RELEASE OF CLAIMS

Claim #042709197

KNOW ALL BY THESE PRESENTS, THAT **Thelma Nickola, a married woman and her husband, George Nickola, both individually and as husband and wife** for and in consideration of the payment of **Twenty Thousand Dollards and no cents ($20,000.00)**, the receipt and sufficiency of which is hereby acknowledged, does (do) hereby for myself (ourselves) and for my (our) heirs, executors, administrators, successors, assigns and any and all other persons, firms, employers, corporations, associations, or partnerships release, acquit and forever discharge **Roy D. Smith** and his, her, their or its agents, servants, successors, heirs, executors, administrators, from claims, actions, causes of actions, demands, rights, damages, costs, loss of wages, expenses, hospital and medical expenses, loss of consortium, loss of service, and any compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of an accident which occurred on or about **April 13, 2004**, at or near **Corunna Road and Elms Road in Flint, Michigan.**

It is understood and agreed that this settlement is in full compromise of a doubtful and disputed claim as to both questions of liability and as to the nature and extent of the injuries and damage, and that neither this release, nor the payment pursuant thereto, shall be construed as an admission of liability, such being denied.

The undersigned hereby declare(s) and represent(s) that the injuries are or may be permanent and that recovery therefrom is uncertain and indefinite and in making this release, it is understood and agreed that the undersigned rely(ies) wholly upon the undersigned's judgment, belief, and knowledge of the nature, extent, effect and duration of said injuries and liability therefor and is made without reliance upon any statement or representation of the party or parties being released, or their representatives, or by any physician or surgeon by them employed.

This release does not include any claim for any applicable Michigan No-Fault benefits nor include any claim that George and/or Thelma Nickola have against any insurance company for any and all applicable uninsured/underinsured motorist coverage and/or other applicable benefits that may be due and/or available to them.

The undersigned further declare(s) and represent(s) that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this release contains the entire agreement between the parties hereto, and that the terms of this release are contractual and not a mere recital.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

Thelma J. Nickola 11/21/04
Signed, Thelma Nickola, claimant — Date

[signature] 11-21-04
Witness — Date

George Nickola 11/21/04
Signed, George Nickola, spouse — Date

[signature] 11-21-04
Witness — Date

Appendix 5

PP 03 11 12 89

UNDERINSURED MOTORISTS COVERAGE

INSURING AGREEMENT

A. We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of "bodily injury":

1. Sustained by an "insured"; and
2. Caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "underinsured motor vehicle".

We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements.

B. "Insured" as used in this endorsement means:

1. You or any "family member".
2. Any other person "occupying your covered auto".
3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1. or 2. above.

C. "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage.

However, "underinsured motor vehicle" does not include any vehicle or equipment:

1. To which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged.
2. Owned by or furnished or available for the regular use of you or any "family member".
3. Owned by any governmental unit or agency.
4. Operated on rails or crawler treads.
5. Designed mainly for use off public roads while not upon public roads.
6. While located for use as a residence or premises.
7. Owned or operated by a person qualifying as a self-insurer under any applicable motor vehicle law.
8. To which a bodily injury liability bond or policy applies at the time of the accident but the bonding or insuring company:
   a. denies coverage; or
   b. is or becomes insolvent.

EXCLUSIONS

A. We do not provide Underinsured Motorists Coverage for "bodily injury" sustained by any person:

1. While "occupying", or when struck by, any motor vehicle owned by your or any "family member" which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.
2. While "occupying" "your covered auto" when it is being used as a public or livery conveyance. This exclusion (A.2.) does not apply to a share-the-expense car pool.
3. Using a vehicle without a reasonable belief that that person is entitled to do so.

B. This coverage shall not apply directly or indirectly to benefit any insurer or self-insurer under any of the following or similar law:

1. workers' compensation law; or
2. disability benefits law.

C. We do not provide Underinsured Motorists Coverage for punitive or exemplary damages.

LIMIT OF LIABILITY

A. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the number of:

1. "Insureds";
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

However, the limit of liability shall be reduced by all sums paid because of the "bodily injury" by or on behalf of persons or organizations who may be legally

responsible. This includes all sums paid under Part A of this policy.

B. Any amounts otherwise payable for damages under this coverage shall be reduced by all sums paid or payable because of the "bodily injury" under any of the following or similar law:

1. workers' compensation law; or

2. disability benefits law.

C. Any payment under this coverage will reduce any amount that person is entitled to recover under Part A of this policy.

D. No one will be entitled to receive duplicate payments for the same elements of loss.

OTHER INSURANCE

If there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

ARBITRATION

A. If we and an "insured" do not agree:

1. Whether that person is legally entitled to recover damages under this endorsement; or

2. As to the amount of damages;

Either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction.

B. Each party will:

1. Pay the expenses it incurs; and

2. Bear the expenses of the third arbitrator equally.

C. Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding as to:

1. Whether the "Insured" is legally entitled to recover damages; and

2. The amount of damages. This applies only if the amount does not exceed the minimum limit for bodily injury liability specified by the financial responsibility law of the state in which "your covered auto" is principally garaged. If the amount exceeds that limit, either party may demand the right to a trial. This demand must be made within 60 days of the arbitrators' decision. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding.

ADDITIONAL DUTY

Any person seeking coverage under this endorsement must also promptly send us copies of the legal papers if a suit is brought.

Appendix 6

LAW OFFICES OF
JOHN D. NICKOLA
1015 CHURCH STREET
FLINT, MI 48502

BOARD CERTIFIED
CIVIL TRIAL SPECIALIST

TELEPHONE
(810) 767-5420

FAX
(810) 767-4719

February 8, 2005

GMAC Insurance
Mr. Gregory Edwards
P.O. Box 3488
Ontario, California 91761-0949

RE:	My Clients/Your Insureds:	George Nickola and Thelma Nickola
	Claim No.:	7297040
	Policy No.:	0318316A04
	Date of Loss:	April 13, 2004

Dear Mr. Edwards:

As you know on October 19, 2004, GMAC authorized my clients acceptance of the tortfeasors policy limits in the amount of $20,000 for Thelma Nickola and $20,000 for George Nickola.

Enclosed are a copy of the executed releases pertaining to the resolution of the claim against Roy D. Smith.

You have had ample opportunity to review the medical records of my clients, which clearly demonstrate the substantial injuries suffered by both Thelma and George Nickola in this crash.

At this time I am requesting payment of the full remaining undersinsured limits available, $80,000.00 each to George and Thelma Nickola, pursuant to their Underinsured Motorist Coverage in their policy.

If you have any questions, or you need additional information before full payment can be made, please advise immediately.

Sincerely,

John D. Nickola

G

Appendix 7

GMAC Insurance

February 17, 2005

Mr. John Nickola, Esquire
1015 Church Street
Flint, MI 48502

RE:		
	Company Name:	Motors Insurance Company
	Claim Number:	7297040
	Insured:	George Nickola
	Claimant:	George & Thelma Nickola
	Date of Loss:	04/13/2004

Dear Mr. Nickola:

Thank you, for your recent letter regarding your clients demands. At this time, we must deny your client's claims for underinsured motorist coverage. Our investigation has revealed that your client's were compensated by the tortfeasor for a combined total of $40,000.

We believe your client's were adequately compensated for their pre-existing injuries, which were aggravated in the accident. Your client's appear to be able to lead their normal life as described in the Kreiner decision. If however, you have some additional information that you want me to review, please forward the medical records and I will be happy to review the matter again.

Sincerely,

Gregory D. Edwards
Claim Representative II
(888) 737-8460, Ext. 5013
(248) 226-5013 Fax: (248) 226-5550
MIC General Insurance Company a GMAC Insurance Company

GMAC Insurance
300 Galleria Office Center #401 / PO Box 5123
Southfield, MI 48086-5123
www.gmacinsurance.com

14

Appendix 8

LAW OFFICES OF
JOHN D. NICKOLA
1015 CHURCH STREET
FLINT, MI 48502

BOARD CERTIFIED
CIVIL TRIAL SPECIALIST

TELEPHONE
(810) 767-5420

FAX
(810) 767-4719

February 22, 2005

CERTIFIED MAIL

GMAC Insurance
Mr. Gregory Edwards
P.O. Box 3488
Ontario, California 91761-0949

WRITTEN DEMAND FOR ARBITRATION/S

RE:	My Client/Your Insured:	Claim #1: George Nickola and Thelma Nickola for Bodily Injury to George Nickola
	Policy No.:	0318316A04
	Date of Loss:	April 13, 2004
	My Client/Your Insured:	Claim #2: Thelma Nickola and George Nickola for Bodily Injury to Thelma Nickola
	Policy No.:	0318316A04
	Date of Loss:	April 13, 2004

Dear Mr. Edwards:

Pursuant to the underinsured motorists coverage terms of my clients' GMAC policy, please consider this letter as written demand for arbitration for the injuries to each of them.

If you do not respond to my demand in seven days you leave me no choice other than file suit to force arbitration.

If you have any questions please do not hesitate to contact this office.

Sincerely,

John D. Nickola

Appendix 9

GMAC
Insurance

March 1, 2005

Mr. John D. Nickola, Esquire
1015 Church Street
Flint, MI 48502

Re: Company Name- Mic General Insurance Corp
Insured- Nickola,George & Thelma
Claim Number- 7297040
Policy Number- 0318316A04
Date Of Loss- 04/13/2004
Your Clients- George & Thelma Nickola

Dear Mr. Nickola:

Thank you for your recent letter, which we received February 28, 2005.

Please be advised that the above policy does not provide automatic coverage for uninsured/underinsured motorists' arbitration. However, our policy does contain an **Uninsured Motorist Coverage Part**, with a section entitled; Arbitration. This section states in part: "Both we and the insured must agree to arbitration." We; do not agree to placing this matter into an arbitration forum. I am sorry we cannot be of assistance in this matter.

If you have any questions, please call me at (888) 233-4575 x5013.

Sincerely,

Gregory Edwards
Claims Representative
MIC General Insurance Corp, a GMAC Insurance Company

GMAC Insurance
Gregory Edwards
PO Box 5123
Southfield, MI 48086-5123
(888) 233-4575 x5013
www.GMACInsurance.com

Appendix 10

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GEORGE NICKOLA and THELMA NICKOLA,

Plaintiffs,

Case No: 05-81192-NI

vs

Hon. Richard B. Yuille

MIC GENERAL INSURANCE CORPORATION
d/b/a GMAC INSURANCE,

Defendant.

JOHN D. NICKOLA P-18295
Attorney for Plaintiffs
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

WILLIAM J. BRICKLEY P-36716
GARAN LUCOW MILLER, P.C.,
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
(810) 695-3700

AFFIDAVIT OF WILLIAM J. BRICKLEY

STATE OF MICHIGAN

ss.

COUNTY OF GENESEE

1. I, William J. Brickley, am the attorney involved in the defense of this matter.

2. I prepared the Answer to the Complaint.

3. At the time I prepared the Answer to the Complaint I did not have a certified copy of the policy at issue.

4. After answering the Complaint I then received a certified copy of the policy.

5. At that time I noted that the uninsured motorist provision of the policy did

indicate that arbitration was discretionary and that both sides had to give permission in order to go arbitration.

6. I also noted that the underinsured motorist portion of the policy did indicate that arbitration was mandatory upon the demand anyone party.

7. Upon review of the policy I did indicate to counsel for the plaintiff that we would be willing to have the matter go to arbitration and all we needed to do was simply choose arbiters and to stipulate to a dismissal of the litigation.

8. Counsel for the plaintiff has refused requests for either.

9. Counsel for the plaintiff has indicated that until such time as his request for attorney fees is heard that he will not agree to go to arbitration or appoint an arbiter.

10. Counsel for the plaintiff has failed to articulate to this counsel any type of reasonable basis for his request that he or his clients are entitled to any type of attorney fees, costs, or other such relief.

11. That if counsel for the plaintiff would have agreed to simply have the matter go to arbitration once it was agreed that the policy provided for it the arbitration matter most probably could have been concluded by this time.

FURTHER DEPONENT SAYETH NOT

WILLIAM J. BRICKLEY P36716
Attorney at Law

Subscribed and sworn to before
me this 13th day of February, 2006.

Kristi L. Weber, Notary Public
Genesee County, MI.
My commission expires:10-3-07

Appendix 11

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

GEORGE NICKOLA and THELMA NICKOLA,
Plaintiffs,

FILED

Case No: 05-81192-NI

vs

Hon. Richard B. Yuille

MIC GENERAL,
Defendant.

JOHN D. NICKOLA P-18295
Attorney for Plaintiffs
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

WILLIAM J. BRICKLEY P-36716
GARAN LUCOW MILLER, P.C.,
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, MI 48439
(810) 695-3760

ORDER

At a session of said Court held in the Courthouse in the City of Flint, State of Michigan on the ___ day of _____, 2006

PRESENT: HONORABLE RICHARD B. YUILLE, Circuit Court Judge

WHEREAS this matter having come before this Court on a Motion of the Plaintiff for Attorney Fees, to Strike Defendant's Answer, Impose Sanctions and other relief; and

WHEREAS the Court being fully advised in the premises.

IT IS HEREBY ORDERED:

1. That Plaintiff shall supply to the Court and to counsel for Defendant its list of costs and expenses, as well as attorney fees;

2. That this case is ordered into Arbitration, and;

3. That this Court retains jurisdiction to enforce compliance and/or make any other determination, orders and/or judgments necessary to fully adjudicate the rights of the ~~Plaintiffs herein.~~ parties herein.

Date: 3/6/2006

Richard B. Yuille

Richard B. Yuille, Circuit Court Judge

W.J. Brickley approves as to form

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Appendix 12

GARAN
LUCOW
MILLER P.C.

8332 OFFICE PARK DRIVE
GRAND BLANC, MI 48439-2035
TELEPHONE: 810.695.3700
FAX: 810.695.6488

William J. Brickley
E-Mail: wbrickley@garanlucow.com

May 12, 2006

John D. Nickola
Attorney at Law
1015 Church Street
Flint, Michigan 48502

RE: Nickola & Nickola v MIC
Our File No: 993-768

Dear Mr. Nickola:

I did receive your letter of May 9, 2006 and thank you for the same. Mr. George Steel will be acting as our arbiter in this matter. By copy of this letter I am asking Mr. Steel and Mr. Hanflik to collaborate on picking a third person to act as the neutral arbiter. They then can take the steps necessary to arrange a hearing date.

I thank you for your cooperation.

Very truly yours,

WILLIAM J. BRICKLEY
For the Firm

WJB/kw
cc: Henry M. Hanflik, Esq.
George W. Steel, Esq.

Appendix 13

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

JOSEPH G. NICKOLA, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE NICKOLA, DECEASED; and JOSEPH G. NICKOLA PERSONAL REPRESENTATIVE OF THE ESTATE OF THELMA J. NICKOLA, DECEASED

Plaintiffs,

v

MIC GENERAL

Defendant.

Case No.: 05-81192-NI
Hon. Richard B. Yuille

JOHN D. NICKOLA P 18295
Attorney for Plaintiffs
1015 Church Street
Flint, MI 48502
810-767-5420
810-767-4719(fax)

MARK PHILLIPS (P63063)
MICHAEL J. PESESKI (P43972)
Attorney for Defendant
1111 W. Long Lake Road, Suite 103
Troy, MI 48098
(336) 435-8601 (direct line)
(248) 267-1265)

MOTION TO:
1. ASSESS COSTS, ATTORNEY FEES AND SANCTIONS;
2. TO ASSESS INTEREST;
3. TO ENTER JUDGEMENT ON THE COSTS AND/OR SANCTIONS, ARBITRATORS AWARD, AND INTEREST

NOW COMES the Plaintiff, Joseph Nickola, in his representative capacity as Personal Representative of the Estates of both George Nickola and Thelma Nickola, his decedents, and says as follows:

1. That Plaintiffs were injured on April 13, 2004 and this civil action was filed on April 8, 2005; the parties agreed on March 6, 2006, that in lieu of trial, the matter would be submitted to

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

binding statutory arbitration and the Court, while retaining jurisdiction, did order the mater to arbitration and the Arbitrators did enter an award on October 2, 2013.

2. That Plaintiffs are entitled to costs, attorney fees, sanctions and interest in addition to the arbitration award.

3. That the Defendant MIC General Insurance, d/b/a GMAC Insurance (hereinafter MIC), insured George and Thelma Nickola, who were insureds of the Defendant and the Plaintiffs were directly **entitled to underinsured motorist benefits** by virtue of an automobile insurance policy, said policy providing **underinsured motorist coverage** in the amount of One Hundred Thousand Dollars ($100,000.00) per person and Three Hundred Thousand Dollars ($300,000.00) each accident, said policy being in effect on or about April 13, 2004.

4. That on or about April 13, 2004, the Plaintiffs were involved in a serious motor vehicle crash with a primary tortfeasor driver and sustained serious bodily injuries.

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5120

5. That the Defendant MIC, pursuant to the above described policy **also provided Michigan Personal Protection Insurance**, a/k/a PIP, to the Plaintiffs, who were directly entitled to such benefits, which included but was not limited to medical expenses, attendant care, and replacement services.

6. That on or about May 7, 2004, Plaintiffs, through their attorney, did file a claim for **under**insured motorist coverage with the Defendant MIC. (See **Attached Exhibit A**)

7. That on or about July 8, 2004, the Defendant was informed by the Plaintiffs' attorney that he was retained on behalf of the Plaintiffs, and the Defendant MIC asked for a summary of the injuries sustained by Plaintiffs, George and Thelma Nickola respectively, which the Plaintiffs did, on July 9, 2004, in writing, submit that summary to MIC as requested. (See **Attached Exhibit B**)

8. That the Defendant **MIC/Gregory Edwards** (the adjuster),

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

requested from the Plaintiffs, permission to review MIC's No-Fault records concerning George and Thelma Nickola and on July 27, 2004, the Plaintiffs, in writing, gave MIC/Mr. Edwards the requested permission in writing. (See **Attached Exhibit C**)

9. That in the said Exhibit C, other information was requested by MIC and MIC was informed that the primary tortfeasor's company would be tendering the full amount of their liability coverage, i.e. $20,000.00/$40,000.00 and that the Plaintiffs requested permission from Defendant MIC to accept that coverage and **settle with the tortfeasor**.

10. That the primary tortfeasor did, on or about September 7, 2004, **offer** the full amount of liability coverage to the Plaintiffs (said amount being $20,000.00 per person).

11. That on September 14, 2004, the Plaintiff **duly informed** the Defendant MIC of the proposed settlement, and forwarded a copy of the primary tortfeasor's insurance company's offer for their review and requested MIC's permission to accept the

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tortfeasor's offer.

12. That on September 14, 2004, the Plaintiffs further indicated that the Defendant MIC **had all of the medical records for the respective** Thelma Nickola and George Nickola's injuries, and that Plaintiffs' attorney **requested the full remaining $80,000 for each Plaintiff for underinsured motorist limits that were available** pursuant to their claim for underinsured motorist coverage and further requested that if there was **additional information** needed before making full payment, to **please advise immediately**. (See **Attached Exhibit D**, with offer to settle)

13. That the Defendant insurer, MIC, **never specified in writing**, (or otherwise) pursuant to MCL 500.2006 (1) - (4), what it claimed constituted a satisfactory proof of loss within 60 days after they received the Plaintiffs' claim, that date being May 7, 2005 (see paragraph #6 herein)

14. That on or about October 14, 2004, the Defendant granted their permission to Plaintiffs to accept the primary tortfeasor's offer to settle. (See **Attached Exhibit E**)

15. That on or about October 19, 2004, the Defendant sent further correspondence to Plaintiffs' counsel again granting to Plaintiffs permission to settle with the tortfeasor and requested a copy of the releases. (See **Attached Exhibit F**)

16. That on February 8, 2005, the Plaintiffs forwarded copies of the releases to Defendant MIC/Mr. Edwards and after settling with the primary tortfeasor with MIC's permission, Plaintiff **renewed** their **claims** for underinsured motorist benefits for $80,000 each Plaintiff, and again referenced MIC's ample opportunity to review the medical records of Plaintiffs George and Thelma Nickola, already possessed by the Defendant, which clearly demonstrated their substantial injuries and **again requested payment** of the full remaining underinsured limits available of $80,000.00 each to George and Thelma Nickola,

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pursuant to their direct claims against the Defendant MIC pursuant to their underinsured motorist coverage in their automobile insurance policy. (See **Attached Exhibit G**)

17. That on or about February 17, 2005, the Defendant/Mr. Edwards summarily responded by denying the Plaintiffs' claims for **underinsured motorist coverage** under Plaintiffs' contract of insurance further claiming MIC's investigation had revealed that the Plaintiffs were adequately compensated by the primary tortfeasor upon payment of the $20,000.00 to each Plaintiff, totaling $40,000.00, further indicating that MIC believed that Plaintiffs were adequately compensated for their pre-existing injuries which were aggravated by the accident, claiming if there was additional information to please forward the medical records and he (Mr. Edwards) would be happy to review the matter again. (Please recall MIC had all of Plaintiffs' medical records for their review) (See **Attached Exhibit H**, and paragraphs 8 & 12 herein)

18. That on February 22, 2005, the Plaintiffs, pursuant to their MIC

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policy, filed a written demand for arbitration with the Defendant. (See **Attached Exhibit I**)

19. That the Defendant MIC acknowledged receipt of Plaintiff's Febraury 22, 2005 written demand for arbitration, but on March 1, 2005, **denied Plaintiff's arbitration demand falsely claiming** that the policy terms required "both we and the insured must agree to arbitration" and MIC refused to agree to arbitration. (See **Attached Exhibit J**)

20. That in response to Plaintiffs' earlier request, for a certified copy of the policy, the said Defendant/Mr. Edwards, on or about March 22, 2005, sent a certified copy of the Plaintiffs applicable auto liability policy to the Plaintiff (See **Attached Exhibit K**, certification and cover letter)

21. That the Plaintiffs were forced to file suit to get the underinsured benefits that they paid for and that suit was filed in the instant matter on April 8, 2005, praying for money

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5120

damages in the amount of $80,000.00 on behalf of George Nickola and Thelma Nickola respectively, and asking the Court to retain jurisdiction to make other orders. (*See Complaint in Court file*)

22. That the Defendant's then Attorney, William Brickley, in response to Plaintiffs Complaint, filed a notice of retention on April 22, 2005.

23. That the Defendant MIC and their Attorney, on May 20, 2005, filed an **unfounded answer** to Plaintiffs' complaint and:

(1) **Falsely claimed** that the Plaintiff did not have the right to demand arbitration **without MIC's agreement**.

(2) **Falsely claimed** that the Plaintiffs inclusion of Exhibit C of the Complaint, the underinsured motorist provision, **was not the proper portion of the policy**, **when it was in fact extracted** from a **copy of the policy** which was **certified** on **March 4, 2005** by MIC and **delivered to the Plaintiffs** on or about **March 22, 2005**, said

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certification stating that the copy of the policy is:

> . . .a true and exact reproduction of the declarations showing coverages carried by the above named insured as of April 13, 2004. . .

(*See paragraph 12 of the Complaint and Answer in Court file, and paragraph 20 of this motion along with Exhibits J and K herein*).

(3) Admitted that Plaintiffs filed a written demand for arbitration (*See paragraph 13 of the Complaint and Answer in Court file*) but that Defendant MIC **denied Plaintiffs' arbitration demand and stated "we [Defendant MIC] do not agree** to placing this matter in an **arbitration forum**." [emphasis added] (*See paragraph 14 of the Complaint and Answer in Court file*, and **Attached Exhibit J**, herein)

24. That the Defendant admitted that the Plaintiffs were insured by the Defendant MIC, said policy providing coverage for underinsured motorist coverage for the protection of the Plaintiffs George and Thelma Nickola and that the policy

provided $100,000.00 per person; $300,000.00 per accident on behalf of George and Thelma Nickola. (*See paragraph 9 of the Complaint and Answer in Court file*)

25. That in response to the Plaintiffs claim for damages **in the instant lawsuit**, the Defendant MIC claimed, amongst other things, that:

A. It would assert said comparative negligence as a bar or set-off to the amounts that Plaintiffs may be entitled to receive.

B. If either Plaintiff failed to mitigate their damages, MIC would seek a dismissal or reduction of their claim for damages.

C. Michigan requires either Plaintiff to sustain a threshold injury and to the extent that either Plaintiff has not sustained a threshold injury, they would seek a bar or dismissal of Plaintiffs's claim for damages.

D. Defendant demanded a trial by Jury.

(*See Answer in Court file*)

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5120

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-6120

26. That thereafter, the Defendants, **pursuant to the underlying litigation**, **demanded considerable amounts of discovery**, and **requested** that the **Plaintiffs sign authorizations entitling** the **Defendant MIC** to **obtain a great multitude of medical records of the Plaintiffs** so that the Defendants would be able to **defend against Plaintiffs' request for money damages** in the **instant lawsuit**.

27. That on August 4, 2005, the Plaintiffs, pursuant to the underlying litigation filed Requests for Admissions of the Defendant. (See **Attached Exhibit L**)

28. That on September 19, 2005 the Defendants filed their **response** to Plaintiffs' **requests for admissions**, and admitted:

A. That the policy that the Plaintiffs had previously referenced (*See Exhibits A and C to the Complaint in Court file)*, was a true copy. (See **Attached Exhibit L**, paragraph 1)

B. That there was an endorsement for underinsured motorist

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5120

coverage. (See **Attached Exhibit L**, paragraph 2)

C. That the underinsured motorist coverage claimed by the Plaintiffs provided that if the insurance company MIC did not agree that

1. The Plaintiffs are entitled to recover underinsured motorist benefits; or

2. As to the amount, **then either party may demand** arbitration.

[emphasis added] (See **Attached Exhibit L**, paragraph 4)

29. That even after that, the Defendant proceeded with more discovery in the instant lawsuit, whereupon Plaintiffs filed a motion on February 1, 2006 to **correct and/or strike pleadings, impose sanctions, assess costs and/or fees and/or remove the case from the ADR docket**.

30. That Plaintiffs' **above motion** was scheduled for hearing on March 6, 2006, and ultimately, prior to a hearing on the matter,

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

the parties stipulated and this Court ordered:

1. That the Plaintiffs shall supply to the Court and to counsel for the Defendant, his list of costs and expenses as well as attorney fees;

2. That this **case is ordered into arbitration**;

3. That the court retains jurisdiction to enforce compliance or make other determinations, orders and/or judgments, necessary to fully adjudicate the rights of the parties herein.

[emphasis added] (See **Attached Exhibit M**)

31. Accordingly, the Plaintiffs, on May 9, 2006 named arbitrator Henry Hanflik and shortly thereafter on May 12, 2006 the Defendant named arbitrator George Steel, with the understanding that those two arbitrators would use their efforts to try to collaborate in picking a third person to act as a neutral arbitrator.

32. That thereafter, the said two arbitrators had a number of discussions and failed attempts, but that the two arbitrators

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

were never able to agree to a third arbitrator.

33. That while awaiting arbitration, the said Thelma Nickola did become seriously ill, and was diagnosed with lung cancer, in October 2007, and did die as a result thereof on January 24, 2008.

34. That Plaintiffs duly informed the Defendant MIC and proceeded to have Joseph Nickola appointed as Personal Representative of the Estate of Thelma Nickola.

35. That during the course of waiting for progress in this statutory arbitration matter, as well as other matters, the said George Nickola, because of his injuries, was unable to continue to live in his home in Gladwin County, Michigan and even though he kept his home, he did take an apartment in Genesee County, where he could be closer to his children.

36. That on or about October 13, 2011, as a result of the instability and/or difficulties with his balance and ability to walk, he did

suffer a fall down a flight of stairs in Genesee County and did suffer serious and disabling injuries including a serious brain injury, wherein he almost died and required a long period of hospitalization and extended care.

37. That the said George Nickola did recover sufficiently to be discharged from the hospital, into an extended care facility and he ultimately, on or about January 28, 2012, went to stay with his son Joseph Nickola, and his family, in Grand Blanc, Michigan.

38. That the said George Nickola did continue to suffer from his injuries, which included, but was not limited to, unsteadiness on his feet and difficulty walking, and while at the home of his son, he did again fall on a driveway, sustaining additional damages to his head and brain, which required emergency surgery, from which the said George Nickola did not recover and he did die on April 14, 2012.

39. That on or about May 30, 2012, the Defendant changed its

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

attorneys and the firm of Peseski and Associates filed a substitution of counsel for William Brickley. (*See Court file*)

40. That on July 13, 2012, Joseph Nickola was substituted in the underlying litigation as the proper party in a representative capacity on behalf of the Estates of both Thelma Nickola and George Nickola, respectively

41. That the said arbitrators nominated by the respective parties herein, i.e. Mr. Hanflik and Mr. Steel, still did not and/or were unable to agree as to a third neutral arbitrator, wherein the Plaintiffs filed a motion on August 3, 2012 requesting that this **Court appoint a third neutral arbitrator** and the Defendant did agree.

42. That on August 13, 2012, this Honorable Court did appoint Donald Rockwell, Esq. as the neutral arbitrator.

43. That the Defendant MIC then contacted Plaintiff and requested permission to change its nominated Arbitrator, which Plaintiff

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

agreed to, and that thereafter, the Defendant MIC substituted Charles Filipiak in lieu of George Steel.

44. That after a number of attempts at scheduling procedures and addressing facts and issues, the matter was ultimately scheduled for an arbitration hearing on October 2, 2013 at which time the arbitrators did render an award which included a monetary award in the amount of $80,000.00 for George Nickola and $33,000.00 for Thelma Nickola respectively, which included **interest as an element of damages from the date of the injury (April 13, 2004) until suit was filed on April 8, 2005, reserving for this Court the duty to determine interest on the amount of the award, costs, sanctions, and attorney fees, and interest on those amounts from the day suit was filed until the judgment is fully paid**. (See **Attached Exhibit N**, Arbitration Award)

45. Prior to filing this motion, the attorney for Plaintiff contacted the Defendant in an attempt to reach an agreement as to the amount of the judgement to be entered in this matter, which

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

would include the arbitrators' award together with costs, interest, attorney fees and sanctions, but was unable to obtain concurrence. (See **Attached Exhibit O**, October 9, 2013 correspondence to Mr. Phillips).

WHEREFORE, Plaintiffs request that this Court enter an order assessing attorney fees and/or costs and/or sanctions against the Defendant for the frivolous defenses, for the time Plaintiff has spent on this matter and/or to schedule a date and time for a hearing thereon;

FURTHER Plaintiffs request that this Court will enter Judgment based on the arbitration award and to include costs, attorney fees, and all applicable interest thereon, until fully paid;

FURTHER, Plaintiffs request that this Court will enter an order consistent with MCL 500.2006(1) - (4) assessing interest at the rate of 12% simple interest from the date of September 13, 2004 up through and including the date of this hearing on this matter, said interest to continue until the judgment is fully paid.

FURTHER Plaintiffs request that this Court grant such other relief as equitable and necessary.

Date: 11/20/13

John D. Nickola (P18295)
Attorney for Plaintiffs

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5120

Appendix 14

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

JOSEPH G. NICKOLA, CONSERVATOR OF
THE ESTATE OF GEORGE NICKOLA
A Protected Person; and JOSEPH G. NICKOLA
PERSONAL REPRESENTATIVE OF THE
ESTATE OF THELMA J. NICKOLA, DECEASED **Case No: 05-81192-NI**

Plaintiffs, **Judge: RICHARD B. YUILLE**

v

MIC GENERAL

Defendant.

_____/

JOHN D. NICKOLA P 18295
Attorney for Plaintiffs
1015 Church Street
Flint, MI 48502
810-767-5420/810-767-4719 (fax)

WILLIAM J. BRICKLEY P36716
GARAN LUCOW MILLER
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, MI 48439
810-695-3700
810-695-6488

_____/

STATEMENT OF FACT OF DEATH OF PLAINTIFF GEORGE NICKOLA

NOW COMES the undersigned attorney for the Plaintiffs herein and files this notice and statement of fact of the death of George Nickola, a party herein, who died on April 14, 2012.

Date: 5/11/12

JOHN D. NICKOLA P18295
ATTORNEY FOR PLAINTIFFS

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Appendix 15

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

JOSEPH G. NICKOLA, CONSERVATOR OF
THE ESTATE OF GEORGE NICKOLA
A Protected Person; and JOSEPH G. NICKOLA
PERSONAL REPRESENTATIVE OF THE
ESTATE OF THELMA J. NICKOLA, DECEASED
THELMA NICKOLA

Plaintiffs,

v

MIC GENERAL

Defendant.

Case No.: 05-81192-NI
Hon. Richard B. Yuille

/

JOHN D. NICKOLA P 18295
Attorney for Plaintiffs
1015 Church Street
Flint, MI 48502
810-767-5420
810-767-4719(fax)

MICHAEL J. PESESKI (P43972)
Attorney for Defendant
1111 W. Long Lake Road, Suite 103
Troy, MI 48098
(336) 435-8601 (direct line)
(248) 267-1265)

/

NOTICE OF SUBSTITUTION OF PARTIES

NOW COMES Joseph Nickola, Conservator of the Estate of George Nickola, by his attorney and states as follows:

1. That on March 16, 2012, Joseph G. Nickola was appointed, by the Genesee County Probate Court, as Personal Representative of the Estate of George Nickola.

2. That on April 14, 2012, George Nickola died and that a notice of death has previously been served on the Defendant May 11, 2012.

3. That on June 8, 2012, Joseph Nickola was appointed as the Personal Representative of the Estate of George Nickola, Deceased. (See attached Letters of Authority)

4. That Plaintiff hereby substitutes Joseph G. Nickola, Personal Representative of the Estate of George Nickola, Deceased in place of Plaintiff Joseph Nickola, Conservator of the Estate of George Nickola.

Date: 6/13/12

John D. Nickola P18295
Attorney for Plaintiffs

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Approved, SCAO

STATE OF MICHIGAN PROBATE COURT COUNTY OF GENESEE	LETTERS OF AUTHORITY FOR PERSONAL REPRESENTATIVE	2012193772DE

Estate of George Nickola, Deceased

TO:

Name and address	Telephone no.
Joseph George Nickola 5095 Rockwood Dr. Grand Blanc, MI 48439	(810) 275-4236

You have been appointed and qualified as personal representative of the estate on 6-8-12 (Date). You are authorized to perform all acts authorized by law unless exceptions are specified below.

☐ Your authority is limited in the following way:

☐ You have no authority over the estate's real estate or ownership interests in a business entity that you identified on your acceptance of appointment.

☐ Other restrictions or limitations are:

☐ These letters expire: N/A (Date).

6-8-12
Date

Susan L Jeske
Judge (formal proceedings)/Register (informal proceedings) Bar no.

SEE NOTICE OF DUTIES ON SECOND PAGE

Habeeb Ghattas P27972
Attorney name (type or print) Bar no.

226 W. Court St.
Address

Flint, MI 48502 (810) 238-1331
City, state, zip Telephone no.

I certify that I have compared this copy with the original on file and that it is a correct copy of the original, and on this date, these letters are in full force and effect.

6-8-12
Date

Susan L Jeske
Deputy register

Do not write below this line - For court use only

FILED
2012 JUN -8 A 8:38
PROBATE COURT
GENESEE COUNTY

PC 572 (10/07) LETTERS OF AUTHORITY FOR PERSONAL REPRESENTATIVE

MCL 700.3103, MCL 700.3307, MCL 700.3414, MCL 700.3504, MCL 700.3601, MCR 5.202, MCR 5.206, MCR 5.307, MCR 5.310

Appendix 16

Approved, SCAO

Original - Court file
1st copy - Assignment Clerk/Extra
2nd copy - Friend of the Court/Extra
3rd copy - Opposing party
4th copy - Moving party

STATE OF MICHIGAN 7th JUDICIAL CIRCUIT JUDICIAL DISTRICT COUNTY	REQUEST FOR HEARING ON A MOTION	CASE NO. 05-81192-NI (YUILLE)

Court address: 900 S. SAGINAW STREET, FLINT, MI 48502

Court telephone no.: 810-257-3220

Plaintiff name(s)		Defendant name(s)
George Nickola PR Estates of George & Thelma Nickol	v	MIC GENERAL
Plaintiff's attorney, bar no., address, and telephone no. JOHN D. NICKOLA (P18295) 1015 CHURCH STREET FLINT, MI 48502 810-767-5420		Defendant's attorney, bar no., address, and telephone no. MICHAEL J. PESESKI (P43972) 1111 W. LONG LAKE ROAD, SUITE 103 TROY, MI 48098 336-435-8601

1. Motion title: PLAINTIFFS' MOTION FOR THE COURT TO APPOINT ARBITRATOR PURSUANT TO MCL600.5015

2. Moving party: PLAINTIFFS

3. Please place the following on the motion calendar for:

Judge	Bar no.	Date	Time
RICHARD B. YUILLE (P22664)		8/13/12 or as soon thereafter as determined by the Court.	1:30 p.m.

Hearing location
☒ Court address above ☐

☒ 4. I certify that I have made personal contact with attempted contact with Michael Peseski on July 30 and Aug 2, 2012 regarding concurrence in the relief sought in this motion and that concurrence has been denied or that I have made reasonable and diligent attempts to contact counsel requesting concurrence with this motion.

August 3, 2012
Date

Attorney John D. Nickola
P18295
Bar no.

5. ☐ DOMESTIC RELATIONS MOTIONS ONLY
a. A recommendation from the Friend of the Court ☐ is ☐ is not requested.
b. All necessary information ☐ has ☐ has not been submitted to the Friend of the Court.

6. Clerk's record of decision: ☐ Granted ☐ Denied ☐ Not heard _____ Date _____ Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

JOSEPH G. NICKOLA, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE NICKOLA, DECEASED; and JOSEPH G. NICKOLA PERSONAL REPRESENTATIVE OF THE ESTATE OF THELMA J. NICKOLA, DECEASED

Plaintiffs,

v

MIC GENERAL

Defendant.

Case No.: 05-81192-NI
Hon. Richard B. Yuille

/

JOHN D. NICKOLA P 18295
Attorney for Plaintiffs
1015 Church Street
Flint, MI 48502
810-767-5420
810-767-4719(fax)

MICHAEL J. PESESKI (P43972)
Attorney for Defendant
1111 W. Long Lake Road, Suite 103
Troy, MI 48098
(336) 435-8601 (direct line)
(248) 267-1265)

/

PLAINTIFFS' MOTION FOR THE COURT TO APPOINT AN ARBITRATOR PURSUANT TO MCL 600.5015

NOW COMES the Plaintiff by his attorney and for his motion for the court to appoint an arbitrator, pursuant to **MCL 600.5015** states as follows:

1. That Plaintiffs filed suit on April 8, 2005 seeking damages and other relief from the Defendant.

2. That thereafter, the parties, by their counsel, agreed that the matter be ordered into arbitration and the Court, on March 6, 2006, signed the said order.

3. That the Court retained jurisdiction to enforce compliance and to make any other determination, orders, and/or judgments necessary to fully adjudicate

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

the rights of the parties herein (statutory arbitration).

4. That the parties herein subsequently agreed to submit the decisions herein to three arbitrators pursuant to Michigan law, and the Court would retain jurisdiction to enforce compliance and/or make any other determinations, orders, and/or judgments necessary to fully adjudicate the rights of the parties herein.

5. That thereafter, the parties named an arbitrator, Plaintiffs - Henry Hanflik, and the Defendant - George Steel, to act as arbitrators.

6. That thereafter, the Plaintiffs, Thelma Nickola and George Nickola became ill and each of them ultimately passed away, although at different times, and their son, Joseph Nickola, was named as Personal Representative of the estate of each and substituted as party for the original Plaintiffs.

7. That thereafter, Mr. Hanflik and Mr. Steel were unable to agree as to a 3rd arbitrator and counsel for the respective parties were also unable to agree.

WHEREFORE, Plaintiff prays that this Court shall, pursuant to MCL 600.5015, appoint an arbitrators herein.

Date: 8/3/12

John D. Nickola (P18295)
Attorney for Plaintiffs

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Appendix 17

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

JOSEPH G. NICKOLA, PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE NICKOLA, DECEASED; and JOSEPH G. NICKOLA PERSONAL REPRESENTATIVE OF THE ESTATE OF THELMA J. NICKOLA, DECEASED

Plaintiffs,

v

MIC GENERAL

Defendant.

Case No.: 05-81192-NI
Hon. Richard B. Yuille

/

JOHN D. NICKOLA P 18295
Attorney for Plaintiffs
1015 Church Street
Flint, MI 48502
810-767-5420
810-767-4719(fax)

MICHAEL J. PESESKI (P43972)
Attorney for Defendant
1111 W. Long Lake Road, Suite 103
Troy, MI 48098
(336) 435-8601 (direct line)
(248) 267-1265)

/

ORDER APPOINTING AN ARBITRATOR PURSUANT TO MCL 600.5015

At a session of said Court held in the Courthouse
in the City of Flint, State of Michigan on the
_____ day of _____, 2012

PRESENT: HONORABLE RICHARD B. YUILLE, Circuit Court Judge

WHEREAS this mater having come before the Court on Plaintiffs' motion to appoint an arbitrator;

IT IS HEREBY ORDERED that the following person is appointed as arbitrator in this matter:

DON ROCKWELL

Honorable Richard B. Yuille
Circuit Court Judge

Date: 8/13/12

JOHN D. NICKOLA, 1015 CHURCH STREET, FLINT, MICHIGAN 48502 (810) 767-5420

Appendix 18

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE
STATUTORY ARBITRATION

ARBITRATION

JOSEPH G. NICKOLA, PERSONAL REPRESENTATIVE
OF THE ESTATE OF GEORGE NICKOLA, DECEASED; and
JOSEPH G. NICKOLA, PERSONAL REPRESENTATIVE
OF THE ESTATE O THELMA J. NICKOLA, DECEASED

Plaintiffs/Claimants,

Case File No. 05-81192-NI
Hon. Richard B. Yuille

vs.

MIC GENERAL

Defendant/Respondent

ARBITRATORS
Donald G. Rockwell
Henry M. Hanflik
Charles F. Filipiak

JOHN D.NICKOLA (P18295)
Nickola and Nickola
1015 Church Street
Flint, Michigan 48502
810.767.5420
Attorney for Plaintiffs/Claimants

MARK E. PHILLIPS (P63063)
Pesecki and Associates
1111 West Long Lake Road, Suite 103
Troy, Michigan 48098
336.435.8608 (Direct)
Attorney for Defendant/Respondent

ARBITRATION AWARD

After the parties, through their respective attorneys, have submitted evidence, summaries and arguments, and the arbitration panel having duly deliberated, the following is the award of the arbitration panel:

$ Eighty Thousand (80,000.00)* to Joseph G. Nickola, Personal Respresentative of the Estate of George Nickola, Deceased, inclusive of interest, if any, as an element of damage from the date of injury to the date of suit, but not inclusive of other interest, fees or costs that may otherwise be allowable by the Court.

$ Thirty Three Thousand (33,000.00)* to Joseph G. Nickola, Personal Respresentative of the Estate of Thelma J. Nickola, Deceased, inclusive of interest, if any, as an element of damage from the date of injury to the date of suit, but not inclusive of other interest, fees or costs that may otherwise be allowable by the Court.

*In addition to any amounts previously paid.

FEES OF ARBITRATORS

The arbitrator fees shall be as follows:

Plaintiffs/Claimants shall be responsible for the fees of Arbitrator Henry M. Hanflik, and the Defendant/Respondent shall be responsible for the fees of Arbitrator Charles F. Filipiak. Plaintiffs/Claimants and Defendant/Respondent shall each be responsible for one-half the fees of Arbitrator Donald G. Rockwell which in total is $ Two Thousand Eight Hundred ($2,800.00)

Dated the 2nd day of October, 2013.

Henry M. Hanflik, Arbitrator

Charles F. Filipiak, Arbitrator

Dissent as to the Estate of George Nickola

Donald G. Rockwell, Arbitrator

Appendix 19

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

Joseph Nickola, personal representative
of the ESTATE OF GEORGE and THELMA NICKOLA,

Plaintiff,

vs Case No. 05-81192-CK

MIC GENERAL INSURANCE CORP.,

Defendants.

_____/

MOTION HEARING

BEFORE THE HONORABLE RICHARD B. YUILLE, CIRCUIT JUDGE

FLINT, MICHIGAN - MONDAY, DECEMBER 9, 2013

APPEARANCES:

For the Plaintiff: JOHN D. NICKOLA P18295
Attorney at Law
1015 Church Street
Flint, Michigan 48502
(810) 767-5420

For the Defendant: MICHAEL J. PESESKI P43972
Attorney at Law
5445 Corporate Drive, Suite 360
Troy, Michigan 48098
(248) 822-6461

Recorded by: Via Video Recorder

Transcribed by: Jan Fagerman CER 7125
Certified Electronic Recorder
(810) 424-4454

TABLE OF CONTENTS

EXHIBITS:

None

WITNESSES:

None

Flint, Michigan

Monday, December 9, 2013 - 10:11 AM

(All parties present)

THE COURT: Case number 05-81192, Nickola versus MIC General.

MR. NICKOLA: Ready, Your Honor.

THE COURT: Who are these other gentlemen here? Are they with you folks?

UNIDENTIFIED VOICE: Probation, sir.

THE COURT: For 10:30?

UNIDENTIFIED VOICE: Yes, sir.

THE COURT: Okay. Very prompt.

MR. PHILLIPS: Good morning. Mark Phillips appearing on behalf of (inaudible - papers being shuffled at podium).

THE COURT: Good morning.

MR. NICKOLA: John Nickola on behalf of the plaintiffs, Your Honor.

Your Honor, I think the motion fairly well states the facts in this particular case. Maybe just to summarize --

THE COURT: I read it. I have one question. That is are the penalties or the costs that you're seeking awarded regardless of whether there was a legitimate good faith defense to the claim?

I'll tell you what my concern is. If they're automatic, that's fine. I mean, if the fact that it took eight years to get payment is sufficient to determine that these costs are applicable, that's one thing. But if it's a fact question, whether the payments were a good faith refusal or declination to make the payments, then why wasn't that issue resolved at the arbitration?

MR. NICKOLA: Let me just recite a -- I don't want to bore you. But the suit -- the claim was --

THE COURT: Uninsured motorists and the No Fault benefits.

MR. NICKOLA: Pardon me?

THE COURT: Uninsured motorist benefits and No Fault benefits.

MR. NICKOLA: Underinsured.

THE COURT: Underinsured. Okay. Yeah.

MR. NICKOLA: The claim was made and there was a tortfeasor that was involved. Finally, the tortfeasor offered the policy limits. We couldn't resolve that until we got permission of the insurance company.

They then finally granted permission to do so. At that particular point, it was resolved with

their permission, written permission, which you have in the motion.

Then at that point, they still said, hey, we're not -- we're done with you. This is the underinsured motorist company, we're done with you.

We said, no, you're not done with us. So, we got into that issue. So, they would not participate in trying to resolve the matter, although we did filed the claim and the claim was pending with them. Not again just against the tortfeasor. So, they were in it from the word go.

Then because they wouldn't participate, we filed a direct lawsuit against our own carrier. The defendant in this case is the carrier for the Nickola's.

In response to that -- here's where the sanctions are requested to come in. In response to that, they filed an answer saying we don't have to arbitrate this case. And they falsely submitted a defense saying that it requires everybody to agree to an arbitration.

Sometime before then, I asked for a certified copy of the policy. It was given to me. I'm saying to the adjuster -- and this is in the motion -- look, I don't know what you're talking

about, because I don't see any language like that in the policy. Then at that point, he just wasn't responding whatsoever.

So, we filed the lawsuit. They filed a false defense saying they had no obligation to do anything from our standpoint. They didn't agree.

THE COURT: Who's they? MIC? Is that who you're referring to?

MR. NICKOLA: Yes. And the adjuster.

So, the case -- now, again, we're in Circuit Court with this case we're in right now before you. That case is then pending. It was pending for over a year and a half. We got some interrogatories and requests for admissions submitted to MIC.

THE COURT: Well, wait a minute. I show that it was filed on April 8, 2005. It was ordered into arbitration on March 6, 2006.

MR. NICKOLA: 2000 what?

THE COURT: 2006.

MR. NICKOLA: Okay.

THE COURT: Less than a year.

MR. NICKOLA: So, again, it was pending a year to a year and a half, and there's discovery --

THE COURT: It's less than a year.

MR. NICKOLA: Well --

THE COURT: April to March is 11 months.

MR. NICKOLA: Okay. It's pending 11 months.

But all during that time, discovery is going on. They demanded a jury trial. We were ready to go on that basis.

During the course of my discovery, I've got requests to admit to them. Finally, they said, oh, my goodness. I have a motion for summary disposition before this Court. Together with my request for admissions that there's no language in any policy that gives them the right not to arbitrate. They say, oh, my goodness, here we go. Now, we made a mistake. What we did was cite the uninsured section of the policy, rather than the applicable underinsured section of the policy.

Then on that basis, before we had the hearing on my motion for directed verdict, that's when we came to an agreement that the tort claim that was pending for the amounts of $80,000 a piece that would be submitted to binding statutory arbitration. And then it was. In lieu of --

THE COURT: Why did it take six years?

MR. NICKOLA: Well, we filed our demand for arbitration. When they finally came to the understanding that they would arbitrate, we named our

arbitrator timely. They named their arbitrator. Then Mr. Hanflik and Mr. Brickley -- or Mr. Hanflik and Mr. --

THE COURT: I mean, this file, I think, was closed by us in March of 2006.

MR. NICKOLA: It wasn't closed, Your Honor. The order of the Court was that the Court would retain jurisdiction to enter the appropriate awards.

THE COURT: I understand. But it wasn't an open case on our docket list at least.

MR. NICKOLA: It was not an open case on the docket. It would have gone properly -- I'm not sure the procedure. It would have gone to a special arbitration docket.

So, at that point, Mr. Hanflik and Mr. Steel, George Steel, were not able to agree to an arbitrator. We asked them to do so. They couldn't. Then I had some discussions with Mr. Brickley and we still couldn't come up with an approach.

So, the question is I can't force the arbitrators to name an arbitrator. Just like the Court would take a matter under advisement, I can't call you and say hurry up and make a decision, Judge, any more than I can ask the arbitrators.

Then subsequently what happened, Thelma

Nickola was diagnosed with a serious disease which ultimately claimed her life. And, on that basis, there had to be some probate matters there.

George Nickola, again, without ever seeing a dime of this underinsured coverage, then he fell and hit his head and he sustained serious brain damage. It almost killed him. It did not. He finally survived that. Then he fell again and the second fall ultimately claimed his life.

So, during that period of time, we're entitled to statutory interest or prejudgment interest from the time we made the claim pursuant to the Unfair Trade Practices Act until the case was resolved or until the arbitrators rendered a decision.

Now, in this particular case, specifically, the arbitrators did not enter an award for any interest other than through the date of the arbitration award.

So, on that basis, we're entitled to prejudgment interest from the day --

THE COURT: Wait a minute. They entered interest from when to when?

MR. NICKOLA: From the date the -- they entered a judgment and the arbitration award which only went through the date of the award. Nothing

else.

THE COURT: That's 2012 or 2013, one or the other.

MR. NICKOLA: Hang on just a second, Your Honor.

THE COURT: Mr. Rockwell was appointed as --

MR. NICKOLA: Hang on just one moment. I'll get --

THE COURT: -- of August of 2012.

MR. NICKOLA: Hang on, Your Honor. Let me just take a quick look.

Here's the award. That is the award for their physical damages only. They specifically say that the award is inclusive of interest (inaudible) as an element of damage from the date of the injury to the date of the suit - *the date of the injury to the date of the suit.* Not the date of the award. Not inclusive of interest, fees or costs that otherwise might be allowable by the Court.

THE COURT: So, now, I have to have a trial to determine what those are?

MR. NICKOLA: No. No. You don't have to --

THE COURT: Why?

MR. NICKOLA: Because it's 12 percent. The statute is quite clear on that basis. It's 12

percent.

Now, you do have to --

THE COURT: If I'm reading the response correctly, it's not quite as clear as you believe it to be.

MR. NICKOLA: I'm sorry, Judge?

THE COURT: I mean, if it's so clear, why are we here?

MR. NICKOLA: I don't know. I don't know.

THE COURT: I mean, he doesn't agree with you.

MR. NICKOLA: Well, he's wrong. He's clearly wrong.

The law is clear. Judge, this issue came up and there was some confusion back in 2006, 2005 and 2006. The Court of Appeals convened a special panel of the Court of Appeals. They addressed the issue in terms of when this is triggered, this 12 percent is triggered. When you make your claim, if you are a first party claimant, if you are directly entitled to the benefits --

THE COURT: Is there an issue of bad faith or good faith in this claim --

MR. NICKOLA: No.

THE COURT: -- in making the interest

determination?

MR. NICKOLA: No.

THE COURT: Is it an issue of good faith or bad faith?

MR. PHILLIPS: No. It's not an issue of good -- well, there's an issue of good faith or bad faith in terms of the UTPA penalty provision. Yes.

THE COURT: Okay.

MR. NICKOLA: Say again?

THE COURT: Are you seeking that?

MR. NICKOLA: Say again?

THE COURT: Are you seeking the UTPA benefits?

MR. NICKOLA: Yes. Yes.

THE COURT: How do I determine good faith or bad faith without having a hearing?

MR. NICKOLA: It's not bad faith. That's not the issue.

The issue that you determine is from the day we made the claim and 60 days thereafter. We are the direct benefits. We make the claim against our own company under that statute. That company has 60 days to pay. Irrespective of whether or not there's a dispute in terms of the amount, they have the obligation to pay. That's clear by the cases.

If they don't pay within that 60 days, then they have 60 days to say this is the proofs that we need to make a satisfactory proof of claim. They never did that. They never submitted anything.

So, when you read the statute, it is clear they've got three things to do. They get the claim. Once they've got the claim, they've got 60 days to either pay it or they've got to say this, in writing, is what we determine you need to do to make a satisfactory proof of loss. Now, if you don't, even if the amount is reasonably disputed, they are not excused from paying the 12 percent.

The second sentence of that Act says if you are a tort claimant. In other words, I'm suing you, Judge, for a tort and I am a tort claimant against whatever your insurance company is and I'm a third party claimant -- not a first party, a third party claimant. Then on that basis, if the amount is reasonably in dispute, on the second sentence of that law, then they may be excused from the 12 percent interest. It does not excuse them from statutory inference. But they are excused from the 12 percent.

That's basically what the entire panel of the Michigan Court of Appeals made up of a cross-section of political -- not political -- different

philosophies, let me say, of the judges, they say we read the statute exactly as it's written. And I think I'm turning into a firm believer of that philosophy. Because that's exactly what the statute says. If you are a first party claimant, there is no excuse. You eighter -- you get the claim, then you either have to pay it within 60 days or say this is the -- in writing, this is what constitutes a satisfactory proof of loss. They never did that in this case.

So then, the case is pending. It goes to arbitration. Specifically reserved from the arbitrator's award is the interest on this case.

The only thing that remains here is the arbitrators are charged to make a determination of the date from the injury until the date suit is filed. The rest of it has to be determined by you.

Now, you say, do I have to have a hearing? Not on that issue. He has not filed any kind of proper response, other than to say, well, it's a third party claim. It's not a third party claim. It's a first party claim.

The only thing you need to do is have a hearing, if there's no way to get it resolved ahead of time, in terms of the amount of sanctions to be imposed on them for their false defense that they

filed in this lawsuit at the beginning that resulted in the delay of 11 months.

Now, Judge --

THE COURT: The arbitration award, they make the award inclusive of interest as an element of damage from the date of injury to the date of suit. Do you agree?

MR. NICKOLA: That's correct. So, from the date of the suit until now, we're entitled to interest.

THE COURT: Was this issue discussed at the arbitration?

MR. NICKOLA: Yes, it was discussed. That's why specifically the arbitrator pulled it out. Judge, if you go to arbitration and the parties all agree all issues are going to be submitted to arbitration --

THE COURT: Which I assume they would.

MR. NICKOLA: No. No. Specifically, this was not submitted to arbitration.

THE COURT: By what order?

MR. NICKOLA: There was no order. It was by agreement. It was by agreement.

THE COURT: Did I agree to that when I sent it to arbitration?

MR. NICKOLA: Pardon me?

THE COURT: Did I agree to that when I signed the order for arbitration?

MR. NICKOLA: No. You just submitted it to arbitration. The arbitrators did not consider interest beyond the date of this lawsuit being filed. That was reserved.

What you did do was reserve in your order --

THE COURT: I may have. But, if I did, I was misinformed because I wouldn't have if I was informed. When I send it to arbitration, as far as I'm concerned, that's it. But I understand. I read the opinion or the order.

MR. NICKOLA: It was not agreed to by us that it would be submitted to arbitration. The arbitrators clearly did not consider that.

THE COURT: All right.

MR. NICKOLA: All they did was award interest from the day of the tort until the date suit was filed.

So, the only thing you have to do -- the calculations, we have the calculations and I submitted them with the brief. If you go to the statutory interest, 1613, I believe it is, then they are entitled to a credit of what they would pay under 1613 against the 12 percent.

But the bottom line is the plaintiffs would require 12 percent, the total amount. So, where it comes from, either one of those two calculations, are fine.

I did do the calculations and sent those to him, I think, Thursday or Friday. They're not part of the record. But I just did the calculations so that he could see him.

So, the only thing you do here in terms of a hearing beyond this point is to have a hearing on terms of the amount of the attorney fees. My fees for defending against a frivolous defense, and it was a frivolous defense from the word go -- you've got an adjuster, I think, out in California who's trying to make a determination of this and he's not knowledgeable, let's call it. Let me say it that way.

So, when suit is filed, they file a defense that is totally unfounded. There is no basis for that defense.

So then, we go through that process and the tort claim of a lawsuit. That's when they say finally, hey, we screwed up. They don't say that in those words. But they do acknowledge that there was no basis for them to file their defense.

So, what we have --

THE COURT: Let me hear from the other side. It's 10:30 and I've got people waiting on the 10:30 call.

MR. PHILLIPS: Good morning, Your Honor. Mark Phillips appearing on behalf of defendant MIC.

Your Honor, I think there's a lot of moving parts. I'd kind of like to delineate a couple issues.

Starting with the request for the attorney fees. This goes back -- attorney fees is a sanction. This goes back to the filing of the lawsuit. I would put to the Court that a defense was filed, an answer to the complaint to was filed and there may have been some confusion at the time regarding whether or not the underinsured language versus uninsured language was controlling. But at the end of the day, both parties agreed, okay, arbitration is appropriate and it went into arbitration.

The Court has broad discretion in assessing attorney fees as a sanction. I think this is a case, as I highlighted in my brief, that does not warrant the imposition of attorney fees for that discrete period of time back in 2005/2006.

In terms of the UTPA, penal interest provision, which I gather is the main meet of this motion as I read the motion and read the brief, I

don't believe it is applicable, Your Honor, to this instant case and by the specific language of the statute itself.

If this was a PIP case, if this was a first party case, where a first party case, a name insured, was seeking benefits and they were not entirely paid, potentially the UTPA would be applicable and that 12 percent would be applicable. But we already have that in the No Fault Act. That is the panel interest penalty provision under an automobile insurance policy is specifically provided for in the No Fault Act.

The UTPA 500.2006(6) states specifically if there's any specific inconsistency between this section, the UTPA, and sections 3101-3177, going on, the provisions of this sections do not apply. In other words, the UTPA is saying if there's conflict between the UTPA and the No Fault Act, UTPA does not apply.

THE COURT: What benefits under the No Fault Act were being sought in this case?

MR. PHILLIPS: No. No. No. The benefits -- contractual benefits were being sought in this case. Underinsured motorist benefits, tort benefits. Not No Fault first party benefits. Third party tort benefits were being sought in this case.

THE COURT: Okay. So, the No Fault -- why would the No Fault Act apply?

MR. PHILLIPS: Well, with the No Fault Act, you still have to meet the threshold. You still have to establish a threshold injury in order to be eligible for coverage. That's key here.

In the statute, if the plaintiff -- this is, I'm sorry, 500.2604(4). If the claimant is a third party tort claimant, then the benefits shall bear interest from the date 60 days after satisfactory proofs are received by the insured at the rate of 12 percent per annum -- this is the important part -- if the liability of the insurer for the claim is not reasonably in dispute. Liability for the insurer.

This is a tort claim where the threshold has to be established. If we adopt plaintiffs' counsel, as soon as a claim is made, there's no notion that we have to -- the threshold injury does not have to be established in underinsured and uninsured motorist cases. That can't be the case. It absolutely cannot be the case.

The case law is clear that the threshold injury has to be established before coverage can even be trigger. There is where this is reasonably in dispute.

This is a case involving -- two plaintiffs were involved in a motor vehicle accident and they settled with the tortfeasor and an assessment could be made that that was sufficient compensation for those injuries. This is a case where you have two individuals who had pre-existing conditions --

THE COURT: By virtue of the settlement with the tortfearsor, there's an acknowledgment at least on some party for that litigation that they met the threshold.

MR. PHILLIPS: Even if that's the case though, then the reasonable in dispute is, well, you've been compensated for those injuries. Your injuries don't rise beyond $20,000, in this case.

That, of course, can be contested and prodded and established. I mean, the notion that in underinsured or uninsured motorists cases, the plaintiff just has to say pay me my money is not the case because of the fact that it is in fact a third party case. Although, they may be named insureds, it's a third party case and this is reasonably in dispute.

The language of the statute itself establishes that. I've gone through -- I went through and --

THE COURT: They've met the threshold.

MR. PHILLIPS: They met the threshold after we found out from the arbitration panel. It would be the same thing if we tried this case.

The only way we know if a threshold has been met, for the most part under *McCormick,* is if a jury tells us. A jury, like the arbitration panel, could decide, you know what, the threshold hasn't been met, or it could also decide that you've been compensated for those injuries. Maybe you've met the threshold and the amount you've already received is full compensation for those injuries. Certainly, that's reasonably in dispute.

I've gone through, Judge, and I've pulled all the cases and I've attached that as a part of my response. There's no case out there that interprets the UTPA as applying to underinsured motorist's contracts or the notion -- or for claims seeking personal injury benefits.

These cases that discuss UTPA, *Griswold* being one, all involve CGL policies, life policies, life insurance policies, commercial policies. Nothing involving the No Fault Act or policies arising under the No Fault Act. I think that's important because I don't think *Griswold* just says, okay, if you're the

named insured, that you're automatically entitled to payment of these benefits. I mean, we make this distinction in the law and the No Fault arena too, first party versus third party claims. And why is that? Because a third party claim is for tort injuries.

That's the case here. They are seeking tort damages for personal injuries. The application of the No Fault Act has to be applied. So, on that basis, I absolutely do not concur or believe that the UTPA provision is applicable here.

Now, as for the seeking of prejudgment interest. Judge, I've got to be honest with you. You asked a very important question of what took so long? I don't have the answer to that. I don't understand what took so long to arbitrate this case.

It seems to me -- I heard an earlier case talking about plaintiffs, I guess, sleeping on their rights. It seems to me that this case is one that could have been resolved and should have been resolved through the arbitration process years ago, *years ago.*

To award prejudgment interest from the date of the filing of the complaint up until the date of the award or beyond simply allows the plaintiff to just sit back and not do anything and all the time the

interest clock is ticking.

Mr. Nickola said that the two arbitrators that were appointed couldn't agree on a third and there was nothing that they could do. Well, of course, there was, and he did it in August of 2012. He filed a motion with this Court saying, Judge, appoint the third party neutral. He should have done that years ago.

This inability of Mr. Hanflik and Mr. Steel to appoint the third party neutral, by my review of the records, was known in 2006. There was no decision made. So, at any point thereafter, he could have come in and said, okay, Judge, we need you to appoint a neutral, let's get this arbitration going. That simply wasn't done. This was allowed to just drag out, drag out and drag out.

I would say if there's any award of interest to be permitted, it certainly is not under the UTPA. I would ask this Court to consider a discrete period of time consistent with the facts under the prejudgment statute. I would also urge this Court not to impose sanctions by way of attorney fees.

I should add ultimately what I'm asking the Court to do is affirm the arbitration award as is. And I brought with me today the arbitration checks for

tendering.

Thank you, Your Honor.

THE COURT: Thank you.

MR. NICKOLA: Judge, just clearly in response to what he has said, he is totally wrong. The statute is absolutely clear, 500.2006. All of the cases that he has cited after 2007 reaffirm the position of the special claims panel of the Court of Appeals. It's 12 percent.

The statute and the argument I am hearing here is that this is a third party claim. It is not a third party claim. He just can't make it a third party claim by saying so.

The fact that the plaintiffs were directly insured, that goes to the issue of the language in 2006(3). Once they've got the claim, certain things have to happen. The first thing that happens, the insurer -- this is (3) -- shall specify in writing the materials that constitute a satisfactory proof of loss not later than 30 days after receipt of the claim unless the claim is settled within 30 days. It was not. The clear language of the statute.

We then go to (4), and that's what the panel of the Court of Appeals specifically directed themselves to. If the benefits are not paid on a

timely basis, the benefits shall bear simple interest from the date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12 percent per annum.

It goes on then. If the claimant is the insured, or an individual, or an entity directly entitled to benefits under the insured's contract of the insurance -- that is what the Nickola's were clearly -- it goes on to say in the second sentence that --

THE COURT: Just so I'm clear, what benefits were they entitled to get under this policy from the get go?

MR. NICKOLA: What benefits were they entitled to get under the policy from what?

THE COURT: From the get go, from the very beginning? When they got notice of the claim, what were they to have been --

MR. NICKOLA: They were entitled to the underinsured motorist insurance coverage.

THE COURT: When was the determination made that it was underinsured?

MR. NICKOLA: I'm sorry, Judge?

THE COURT: When did the underinsured clause come into effect?

MR. NICKOLA: On the date they were injured. The date of the accident.

THE COURT: Was there insurance with the other party?

MR. NICKOLA: Yes, $20,000 coverage.

THE COURT: Okay. So, they knew immediately on the day of the accident that there was more than $20,000 in damages?

MR. NICKOLA: Absolutely.

THE COURT: How did they know that?

MR. NICKOLA: Well, they knew it from the date that I filed the claim. Let's go there. They knew it from the date that I filed the claim, which was shortly after that. I've got the date in my brief.

THE COURT: How would they know that? How would they know the value of the claim immediately upon your filing the complaint or the notice?

MR. NICKOLA: If they didn't know it, the second sentence of that statute is now what comes into play. If they say now -- hang on a minute -- if the claimant is a third party tort claimant, then the benefits shall bear interest 60 days or pay the interest if the liability of the insured for the claim is not reasonably in dispute.

Now, to answer your question specifically. In that 60 day period, if they say the amount of the Nickola's claim is reasonably in dispute, the statute is clear. They have to give written notice and say the amount of the claim is reasonably in dispute, if you're the third party claimant. They don't have that same right if it's a direct claim, and this was a direct claim. This was the direct claim.

THE COURT: Okay. I'm done.

MR. NICKOLA: Now --

THE COURT: Okay. I'm done. I've heard enough. Thank you.

(At 10:41 AM, proceedings concluded)

Tape No. 12/09/13 10:41 AM

STATE OF MICHIGAN)
COUNTY OF GENESEE)

I, Jan Fagerman, do hereby certify that this transcript, consisting of 29 pages, is a complete, true and correct transcript to the best of my ability of the videotaped proceedings taken in this case on Monday, December 9, 2013, before the Honorable Richard B. Yuille, Circuit Judge.

October 10, 2014

Jan Fagerman

JAN FAGERMAN CER 7125
Circuit Courthouse
900 S. Saginaw Street
Flint, Michigan 48502
(810) 424-4454

Appendix 20

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

Joseph G. Nickola, Personal Representative of the Estate of George Nickola, deceased, et al,

Plaintiffs,

Case No. 05-81192-NI

vs

Judge Richard B. Yuille

MIC General Insurance Corporation,

Defendant.

ORDER DENYING MOTION TO ASSESS COSTS, SANCTIONS, ET AL PURSUANT TO MCL 500.2006

At a session of said Court held in Flint, Michigan, June 19, 2014.

PRESENT: Honorable Richard B. Yuille, Circuit Judge.

Pending before this Court is plaintiffs' claims for prejudgment penalty interest authorized by Michigan's Uniform Trade Practices Act (UTPA), MCL 500.2001, et seq. The particular claims at issue are plaintiffs' efforts to recover underinsured motorist benefits awarded through arbitration pursuant to their no fault insurance policy.

The Court has reviewed the briefs of the parties and heard the arguments of counsel.

The Court finds that the analysis provided by defendant to be correct. If there is any inconsistency between the Michigan No Fault Act and the UTPA, the provisions of the UTPA do not apply. MCL 600.2006 (6).

The Court further finds that the underinsured motorist claims were reasonably in dispute. Further, the Court is of the opinion that if there was an

issue regarding the wrongful withholding of underinsured motorist benefits, that issue should have been heard by the arbitrator.

Plaintiffs' motion is **DENIED**.

The arbitration awards are affirmed.

Richard B. Yuille, Circuit Judge
June 19, 2014

Appendix 21

Case Search

Case Docket Number Search Results - 322565

Appellate Docket Sheet

COA Case Number: 322565

MSC Case Number: 152535

ESTATE OF GEORGE NICKOLA V MIC GENERAL INSURANCE COMPANY

1	GEORGE NICKOLA ESTATE OF	ZZ		
2	THELMA NICKOLA ESTATE OF	ZZ		
3	NICKOLA JOSEPH G PERSONAL REPRESENTATIVE Oral Argument: Y Timely: Y	PL-AT	RET	(23490) **BENDURE MARK R** 15450 EAST JEFFERSON SUITE 110 GROSSE POINTE PARK MI 48230 (313) 961-1525
4	MIC GENERAL INSURANCE COMPANY Oral Argument: Y Timely: Y	DF-AE	RET	(63063) **PHILLIPS MARK E** 1111 WEST LONG LAKE RD SUITE 103 TROY MI 48098 (248) 267-1265
			CO	(66596) **PEPLINSKI NATHAN** 1050 WILSHIRE DR SUITE 320 TROY MI 48084 (248) 649-7800
5	GMAC INSURANCE	DB		

COA Status: Case Concluded; File Open **MSC Status:** Pending on Application

07/07/2014 1 Claim of Appeal - Civil
- Proof of Service Date: 07/10/2014
- Jurisdictional Checklist: Y
- Register of Actions: Y
- Fee Code: EPAY
- Attorney: 23490 - BENDURE MARK R

06/19/2014 2 Order Appealed From
- From: GENESEE CIRCUIT COURT
- Case Number: 05-081192-NI
- Trial Court Judge: 22664 YUILLE RICHARD B
- Nature of Case:
  - Attorney Fees & Costs

07/07/2014 5 Docketing Statement MCR 7.204H
- For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
- Proof of Service Date: 07/07/2014
- Filed By Attorney: 23490 - BENDURE MARK R
- Comments: filed with claim in event 1

07/10/2014 6 Telephone Contact

For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
Attorney: 23490 - BENDURE MARK R
Comments: atty Peseski is correct atty - will file pos

07/10/2014 7 Proof of Service - Generic
Date: 07/10/2014
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
Attorney: 23490 - BENDURE MARK R
Comments: proof of service of claim on atty Peseski

07/22/2014 8 Appearance - Appellee
Date: 07/22/2014
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE
Attorney: 63063 - PHILLIPS MARK E

07/28/2014 9 Invol Dismissal Warning - No Steno Cert
Attorney: 23490 - BENDURE MARK R
Due Date: 08/18/2014
Comments: No steno cert filed-court reporter(s) and hearing date(s) unknown

08/18/2014 10 Steno Certificate - Tr Request Received
Date: 08/18/2014
Timely: Y
Reporter: 6913 - ROBINSON SHELIE M
Hearings:
02/14/2012
08/13/2012
12/19/2013

08/22/2014 11 Other
Date: 08/08/2014
Reporter: 6913 - ROBINSON SHELIE M
Comments: steno cert for hearing dates in evt 10

10/28/2014 12 Notice of Filing Transcript
Date: 10/20/2014
Timely: Y
Reporter: 6913 - ROBINSON SHELIE M
Hearings:
02/14/2006
08/13/2012
12/09/2013

10/28/2014 13 Transcript Cancelled
Date: 10/20/2014
Reporter: 6913 - ROBINSON SHELIE M
Hearings:
02/14/2012
12/19/2013
Comments: Per online ROA, there was nothing on the record for these hrg dts

10/29/2014 15 Appearance - Appellee
Date: 10/29/2014
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE
Attorney: 25213 - SCHMIDT MICHAEL F
Comments: as co counsel

10/29/2014 16 Appearance - Appellee
Date: 10/29/2014
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE

Attorney: 66596 - PEPLINSKI NATHAN
Comments: as co counsel- from the same firm as atty Schmidt

10/31/2014 14 Telephone Contact
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE
Attorney: 25213 - SCHMIDT MICHAEL F
Comments: intends to be co counsel- will not replace atty Phillips in header

12/15/2014 17 Stips: Extend Time - AT Brief
Extend Until: 01/12/2015
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT

01/08/2015 18 Motion: Extend Time - Appellant
Proof of Service Date: 01/08/2015
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
Fee Code: EPAY
Requested Extension: 02/09/2015
Answer Due: 01/15/2015

01/20/2015 19 Submitted On Administrative Motion Docket
Event: 18 Extend Time - Appellant
District: T

01/22/2015 20 Order: Extend Time - Appellant Brief - Grant
View document in PDF format
Event: 18 Extend Time - Appellant
Panel: MJT
Attorney: 23490 - BENDURE MARK R
Extension Date: 02/09/2015

02/09/2015 21 Brief: Appellant
Proof of Service Date: 02/09/2015
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT

02/27/2015 23 Stips: Extend Time - AE Brief
Extend Until: 04/13/2015
Filed By Attorney: 63063 - PHILLIPS MARK E
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE
P/S Date: 02/27/2015

04/13/2015 24 Brief: Appellee
Proof of Service Date: 04/13/2015
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 66596 - PEPLINSKI NATHAN
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE

04/14/2015 25 Noticed
Record: REQST
Mail Date: 04/15/2015

04/28/2015 26 Motion: Extend Time - Reply Brief
Proof of Service Date: 04/28/2015
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
Fee Code: EPAY

Requested Extension: 05/25/2015
Answer Due: 05/05/2015

05/07/2015 27 Record Request
Mail Date: 05/07/2015
Agency: GENESEE CIRCUIT COURT

05/12/2015 28 Submitted On Administrative Motion Docket
Event: 26 Extend Time - Reply Brief
District: T
Item #: 1

05/14/2015 29 Record Filed
Comments: 1 LCF (TRN INC) - GENESEE CIRCUIT

05/19/2015 31 Order: Extend Time - Reply Brief - Grant
View document in PDF format
Event: 26 Extend Time - Reply Brief
Panel: MJT
Attorney: 23490 - BENDURE MARK R
Extension Date: 05/25/2015

05/22/2015 32 Brief: Reply
Proof of Service Date: 05/22/2015
Timely Filed: Y
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT

08/28/2015 38 Brief: Supplemental Auth`y
Proof of Service Date: 08/28/2015
Filed By Attorney: 25213 - SCHMIDT MICHAEL F
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE

08/31/2015 39 Motion: Strike
Proof of Service Date: 08/31/2015
Filed By Attorney: 23490 - BENDURE MARK R
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
Fee Code: EPAY
Immediate Consideration: Y
Answer Due: 09/03/2015
Comments: Motion to Strike Supplemental Authority

08/31/2015 41 Telephone Contact
For Party: 3 NICKOLA JOSEPH G PERSONAL REPRESENTATIVE PL-AT
Attorney: 23490 - BENDURE MARK R
Comments: Advised motion to strike noticed for after case call date.

09/03/2015 42 Answer - Motion
Proof of Service Date: 09/03/2015
Event No: 39 Strike
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE
Filed By Attorney: 63063 - PHILLIPS MARK E

09/04/2015 40 Submitted On Motion Docket Affecting Call
Event: 39 Strike
District: T
Item #: 1

09/09/2015 43 Order: Strike - Motion - Deny
View document in PDF format
Event: 39 Strike
Panel: MFG,KJ,JMB

Immediate Consideration Granted
Attorney: 23490 - BENDURE MARK R

09/10/2015 37 Submitted on Case Call
District: D
Item #: 19
Panel: MFG,KJ,JMB

09/24/2015 48 Opinion - Per Curiam - Published
View document in PDF format
Pages: 10
Panel: MFG,KJ,JMB
Result: Affirmed in Part, Remanded
Comments: Remanded to trial court for further proceedings not inconsistent with this opinion

10/29/2015 50 SCt: Application for Leave to SCt
Supreme Court No: 152535
Answer Due: 11/26/2015
Fee: E-Pay
For Party: 3
Attorney: 23490 - BENDURE MARK R

11/17/2015 51 Supreme Court - File & Record Sent To
File Location: Z
Comments: sc#152535 lcf(tr incl)

11/17/2015 52 SCt: COA and TCt Received
1 files

11/24/2015 53 SCt: Answer - SCt Application/Complaint
Filing Date: 11/24/2015
For Party: 4 MIC GENERAL INSURANCE COMPANY DF-AE
Filed By Attorney: 25213 - SCHMIDT MICHAEL F

05/10/2016 54 Michigan Appeals Reports Publication
312 Mich App 374

05/25/2016 55 SCt Order: MOAA -Oral Argument on Lv Appl
View document in PDF format

Case Listing Complete

Appendix 22

STATE OF MICHIGAN

COURT OF APPEALS

JUANITA RIVERA and JESUS M. RIVERA,

Plaintiffs-Appellants,

v

ESURANCE INSURANCE CO, INC.,

Defendant-Appellee.

UNPUBLISHED
July 24, 2007

No. 274973
Oakland Circuit Court
LC No. 2005-071390-CK

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting defendant's motion for summary disposition. We affirm.

I. FACTS

Plaintiff[1] was injured in an automobile accident in December 2003. Defendant insured plaintiff, but the other driver, Lakeisha Carter, was uninsured. Plaintiff filed suit against Carter, which resulted in entry of a default judgment. Plaintiff then filed the instant action against defendant, alleging breach of contract for defendant's failure to pay noneconomic (pain and suffering) and economic (excess wage loss) damages under its policy.

Defendant moved for summary disposition, asserting that it was entitled to a judgment as a matter of law because plaintiff had not met the statutory threshold—she had not suffered a serious impairment of body function. Plaintiff filed a cross-motion for summary disposition, arguing that she was entitled to judgment as a matter of law because defendant was bound by the default judgment entered in the third-party case, wherein another judge of the court had concluded that plaintiff had suffered a serious impairment of body function. The trial court granted defendant's motion, concluding that plaintiff's injuries have not affected her general ability to lead her normal life.

[1] All references to "plaintiff" in the singular are to Juanita Rivera because Jesus Rivera's claim is derivative.

Defendant then moved for entry of an order of dismissal. But plaintiff objected, asserting that the trial court's decision regarding whether plaintiff suffered a serious impairment of body function did not dispose of the case because plaintiff was still entitled to excess wage loss benefits for the reduction in work hours she suffered as a result of her injuries. Plaintiff also moved for reconsideration of the trial court's grant of summary disposition on the issue of serious impairment of body function. The trial court heard oral arguments and concluded that defendant was entitled to summary disposition as to both of plaintiff's claims. As to plaintiff's excess wage loss claim, the trial court reasoned that while plaintiff had shown that her work hours had been reduced since the accident, she failed to show that the reduction was based on her injuries and not other causes, such as a downturn in the auto industry. Plaintiff now appeals.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When reviewing a motion for summary disposition, this Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.*

III. ANALYSIS

A. Serious Impairment of Body Function

Plaintiff first argues that the trial court erred in concluding that she has not suffered a serious impairment of body function. Specifically, plaintiff contends that her injuries have affected her general ability to lead her normal life. We disagree.

Under the no-fault act, "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

The issue whether a plaintiff has suffered a serious impairment of body function is a question of law for the court if there is no factual dispute concerning the nature and extent of the injuries, or if there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a). Otherwise, the determination whether the plaintiff suffered a serious impairment of body function is a question of fact for the jury. See *Kreiner v Fischer*, 471 Mich 109, 132; 683 NW2d 611 (2004).

In determining whether a plaintiff has suffered a serious impairment of body function, the trial court must consider the following: (1) whether an important body function of plaintiff has been impaired; (2) whether the impairment is objectively manifested; and (3) whether the

impairment affects the plaintiff's general ability to lead his or her normal life. *Id.* at 132-133. A plaintiff does not satisfy the first prong of the serious impairment test if an unimportant body function is impaired or if an important body function has been injured but not impaired. *Id.* at 132. Further, "[f]or an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis." *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002), quoting with express approval SJI2d 36.11. Here, the trial court concluded that plaintiff's injury was an objectively manifested impairment of any important body function, and defendant has not challenged that decision in a cross-appeal. Therefore, the only element at issue here is whether plaintiff's injuries have affected her general ability to lead her normal life.

Under *Kreiner*, to determine whether a person is generally able to lead his or her normal life, this Court must consider whether the objectively manifested impairment has affected the overall course of the plaintiff's life. *Kreiner*, *supra* at 130-131. It must examine how, to what extent, and for how long the plaintiff's life has been affected by the impairment, looking at plaintiff's life both pre- and post-accident. *Id.* at 131. In addition, it may consider such factors as the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery. *Id.* at 133-134. However, self-imposed restrictions do not establish that an injury has affected a person's ability to lead his or her normal life. *Id.* at 133 n 17. Further, "[a] negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Id.* at 137.

We conclude that the trial court did not err in granting defendant's motion for summary disposition because plaintiff has failed to meet the threshold of serious impairment of body function – she has failed to show that her general ability to lead her normal life has been affected by the injuries she sustained in the auto accident.

Plaintiff suffered injuries to her back and neck in the auto accident. While her doctor has imposed ongoing work restrictions[2] and she testified that it takes her longer to do her job, plaintiff has continued to work since the accident in excess of 40 hours per week. Additionally, while plaintiff testified that she is now unable to participate in many activities post-accident because of her injuries, such as bike riding, working out, gardening, and household chores, she has not been restricted from any of these activities by her doctor. Instead, these restrictions are

---

[2] Plaintiff's doctor opined as follows regarding plaintiff's limitations:

> Physical labor work, lifting and carrying involved. Bending and stooping involved. Standing long hours. Was standing long hours, 1 hour and 45 minutes stretch; patient can't do it. For the rest of her life, she is limited from it. The patient may do minimal physical work, sedentary or desk job, with great flexibility in freedom, change in position and posture and freedom to change the height of the workstation also, should have greater freedom of flexibility and working hours. She may not work 40 hours every week consistently.

self-imposed, and self-imposed restrictions, based on real or perceived pain, are insufficient to establish an impairment. *Kreiner*, *supra* at 133 n 17. Therefore, even when viewing this evidence in the light most favorable to plaintiff, we conclude that there is no genuine issue of material fact as to whether plaintiff's injuries have affected her general ability to lead her normal life.

After *Kreiner*, it is not enough for plaintiff to show that her injuries had some effect on her life. Rather, she must show that her injuries affected the overall course of her life. *Kreiner*, *supra* at 130-131. "A negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Id.* at 137. Here, because the evidence presented by plaintiff does not show that the overall course of her life has been affected by her injuries, she has failed to meet the threshold of a serious impairment of body function.

Plaintiff further argues that the trial court erred in concluding that she did not suffer a serious impairment of body function because, under the doctrine of res judicata, defendant was bound by the default judgment entered against the uninsured driver in the third-party case, which stated that plaintiff did suffer a serious impairment of body function. Again, we disagree.

The doctrine of res judicata bars a second, subsequent action "when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Sewell v Clean Cut Mgt*, 463 Mich 569, 575; 621 NW2d 222 (2001). In this case, the prior action was decided on the merits, *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006) (finding that a default judgment is a final decision on the merits), and the issue of serious impairment of body function was resolved in the first case in plaintiff's favor. However, both actions do not involve the same parties or their privies. Defendant was not a party to the third-party case. Therefore, for the doctrine of res judicata to apply, defendant must be in privity with Carter, the uninsured motorist. Privity requires a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant in the first action. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 214; 699 NW2d 707 (2005). As to private parties, a privy includes a person so identified in interest with another that he represents the same legal right, such as a principal to and agent, a master to a servant, or an indemnitor to an indemnitee. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 15; 672 NW2d 351 (2003). That is not the case here. Defendant and the third-party tortfeasor's rights and interests are not the same; therefore, they are not in privity for purpose of the doctrine of res judicata.

B. Excess Wage Loss

We also reject plaintiff's argument that the trial court erred in granting summary disposition as to her excess wage loss claim.

Under MCL 500.3135(3)(c), damages are recoverable for "work loss . . . as defined in sections 3107[3] and 3110[4] in excess of the "daily, monthly, and 3-year limitations contained in those sections." Further, an injured party may recover excess wage loss damages under MCL 500.3135(3)(c) even where the plaintiff has not met the threshold requirement necessary to

---

[3] MCL 500.3107 provides, in part, as follows:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care, or for funeral and burial expenses in the amount set forth in the policy which shall not be less than $1,750.00 or more than $5,000.00.
>
> (b) Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. Beginning March 30, 1973, the benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed $1,000.00, which maximum shall apply pro rata to any lesser period of work loss. Beginning October 1, 1974, the maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum.
>
> (c) Expenses not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

[4] MCL 500.3110(4) states, "Personal protection insurance benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss is incurred."

sustain an action for noneconomic damages under MCL 500.3135(1). *Ouelette v Kenealy*, 424 Mich 83, 86; 378 NW2d 470 (1985). However, a plaintiff may only recover for the "'loss of income from work [he] would have performed' if he had not been injured[,]" not loss of earning capacity *Id.* at 87 (citation omitted). Moreover, a plaintiff must show that he suffered wage loss as a result of the auto accident. See *Marquis v Hartford Accident & Indemnity* (*After Remand*), 444 Mich 638, 644; 513 NW2d 799 (1994).

In this case, the trial court heard oral arguments regarding plaintiff's excess wage loss claim[5] and concluded that defendant was entitled to summary disposition because plaintiff failed to show anything more than mere speculation that her reduction in work hours was caused by her injuries. We agree.

While plaintiff's employment records reflect that she has indeed worked fewer hours since the accident in December 2003, there was evidence that plaintiff's work hours fluctuated from year to year before the accident, and plaintiff has continued to work an average that is in excess of 40 hours per week since the accident. From our review of the record in this case, it would appear likely that the reduction in plaintiff's work hours resulted from a lack of overtime. Therefore, plaintiff failed to show that her excess wage loss was a result of the injuries she sustained in the auto accident.

Affirmed.

/s/ Deborah A. Servitto
/s/ Kathleen Jansen
/s/ Bill Schuette

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[5] The issue was raised at the hearing on the parties' motions for entry of an order.

Appendix 23

STATE OF MICHIGAN

COURT OF APPEALS

ANNE SCHENCK,

Plaintiff-Appellant,

v

ALIA ASMAR and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
July 1, 2014

No. 315053
Macomb Circuit Court
LC No. 11-002380-NI

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

In this action for payment of underinsured motorist coverage, plaintiff appeals as of right the trial court's judgment, following the jury trial, in her favor in the amount of $10,000. We affirm.

Plaintiff had a $100,000 underinsured motorist policy with defendant State Farm. Plaintiff was injured when her vehicle was struck by a vehicle driven by defendant Alia Asmar while traveling at a high rate of speed on I-696. Plaintiff suffered a fracture of her back. Before the accident, plaintiff was described as energetic, lively, and an avid soccer player. She also worked for Google in Ann Arbor. After the accident, plaintiff was described as sad and depressed, unable to walk, and unable to work. Plaintiff collected wage loss benefits from State Farm under the no-fault policy in the amount of $86,446.95. Plaintiff also collected $71,150.79 in disability benefits through Prudential. However, in contrast to plaintiff's claims that she was unable to drive to and sit at work because of pain, there was evidence that plaintiff travelled extensively, including trips to Europe and Alaska, and her physical injury was resolved within six months of the accident. Consequently, the defense questioned whether plaintiff claimed an extensive disability because the payment of benefits exceeded her income.

Asmar admitted responsibility for the accident, but she was only insured up to $25,000 for noneconomic damages, which the no-fault insurer paid, and Asmar was dismissed from the case. Through plaintiff's underinsured motorist policy, State Farm agreed to pay noneconomic damages up to $100,000 that Asmar would have been responsible for. Therefore, at trial, the issues involved whether plaintiff suffered a threshold injury pursuant to MCL 500.3135(1) to collect on the underinsured motorist policy, or more specifically, a serious impairment of body function.

Before trial, plaintiff moved the trial court to hold that evidence of the payments of Prudential and State Farm was not admissible before the jury under the collateral source rule. State Farm essentially argued that the evidence was admissible to prove that plaintiff malingered in returning to work. The trial court agreed with State Farm and allowed the evidence, but only to prove that plaintiff malingered in returning to work. After trial, the jury found for the plaintiff in the amount of $10,000.

On appeal, plaintiff argues that the trial court abused its discretion in admitting the aforementioned evidence. We disagree. "We review a trial court's decision to admit or exclude evidence for an abuse of discretion." *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). A court necessarily abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id.* Reversal on the basis of the erroneous admission of evidence is unwarranted unless a substantial right of a party is affected, and it affirmatively appears that the failure to grant relief is inconsistent with substantial justice. *Id.* An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "The collateral source rule bars evidence of other insurance coverage when introduced for the purpose of mitigating damages." *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 58; 457 NW2d 637 (1990). Evidence regarding collateral sources and their effect on an individual's motivation to return to work is admissible in the trial court's discretion. *Richards v Pierce*, 162 Mich App 308, 318-319; 412 NW2d 725 (1987). The trial court has the discretion to "admit evidence bearing on the question of whether an injured party possessed sufficient incentive to return to work." *Blacha v Gagnon*, 47 Mich App 168, 174-175; 209 NW2d 292 (1973). Consequently, evidence may be admitted that absence from work was not solely attributed to the injuries received, but because plaintiff had accumulated sick leave. *Id.* at 175. Pursuant to *Nasser*, evidence of other insurance coverage is barred by the collateral source rule only where it is being offered to mitigate damages. *Nasser*, 435 Mich at 58. Therefore, if the evidence was admissible for a separate purpose, the trial court properly exercised its discretion in admitting it. *Id.* at 58-59. If the evidence is relevant and offered for a proper purpose, the evidence nonetheless should be excluded if more prejudicial than probative under MRE 403. *Id.* at 59-60.

The present case involves an underinsured motorist claim by plaintiff against State Farm. Such a policy allows an individual to collect from their own insurance carrier in the amount that would be permitted in a suit against the at-fault driver. See *Rory v Continental Ins Co*, 473 Mich 457, 465-466; 703 NW2d 23 (2005). Under the no-fault act, the at-fault driver is liable for noneconomic loss when "the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). The issue in the present case is whether there was a serious impairment of body function. The no-fault act provides that "a 'serious impairment of body function' is 'an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.'" *McCormick v Carrier*, 487 Mich 180, 194-195; 795 NW2d 517 (2010). "Determining the effect or influence that the impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the incident." *Id.* at 202.

Plaintiff presented evidence that she worked full time at Google and led an athletic, active lifestyle before the accident. However, she testified that her condition following the accident prevented her from working and engaging in her pre-accident activities to establish a

serious impairment of body function. To rebut this evidence, State Farm offered proof that plaintiff was able to return work, evidenced by her multitude of vacations after the accident, including a cruise around Europe and a sailing trip in Alaska. Further, evidence provided by plaintiff's doctor suggested that plaintiff's spine was healed after approximately six months, but she continued to receive disability benefits for 17 months after the accident, when she lost her job at Google, and wage loss benefits from State Farm. In sum, the evidence of the payments provided motive for plaintiff to avoid returning to work — traveling at will while continuing to collect approximately double her salary. *Blacha*, 47 Mich App 175. The evidence was undoubtedly relevant under MRE 401, and admissible under MRE 403. See *Nasser*, 435 Mich 58-60. While there was some danger the jury would assume the money received from State Farm and Prudential was enough to compensate plaintiff for her losses, that outcome was protected against by the trial court's ruling and State Farm's conduct limiting evidence of the payments only to issues regarding serious impairment of body function.

Therefore, because the evidence was admissible to prove whether plaintiff suffered a serious impairment of body function, and not to mitigate damages, the collateral source rule did not apply. *Nasser*, 435 Mich at 58. As such, the trial court properly exercised its discretion in admitting the evidence. *Id.*

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood